

## RECONCEPTUALIZING CONSUMER TERMS OF USE FOR A GLOBALIZED KNOWLEDGE ECONOMY\*

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### ABSTRACT

U.S.-style terms of use (“TOU”) are “take it or leave it” waivers, masquerading in the clothing of contract and divesting consumers of important procedural and substantive rights. As U.S.-based software publishers and platforms go global, the one-sided TOU agreements they employ will increasingly be under scrutiny in European Union (EU) countries and other nations with radically different legal traditions. Thus, U.S. companies need to pay close attention to the EU’s mandatory consumer provisions governing their agreements, and perhaps even adopt a minimum floor for consumer rights as they intersect with TOUs. The following argument for re-conceptualizing consumer TOUs—so that they afford consumers minimum adequate rights and remedies—unfolds in four

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parts. Part I explains how TOUs have evolved from shrinkwrap mass-market licenses to clickwrap, browsewrap, and other methods. Parts II and III demonstrate that European Union regulations offer mandatory procedural and substantive rights for consumers. Part IV examines ten problems with TOUs and proposes that these troublesome practices be reformed so that companies will be able to safely export consumer information products.

#### INTRODUCTION

To paraphrase Woody Allen's character, Alvy Singer in *Annie Hall*, U.S.-style terms of use (TOU) agreements fall somewhere on the continuum between the horrible and the miserable.<sup>1</sup> TOU agreements, presented on a "take it or leave it" basis, are spreading faster than the 2011 New York City bed bug epidemic. Just as bed bugs hide in cracks and crevices of mattresses and box springs, sneakwrap documents, masquerading in the clothing of contracts, purport to bind consumers to oppressive and unfair terms.<sup>2</sup> Social networking TOU agreements, for example, are the most widely used standard form contract in world history with potentially billions of users. Facebook alone has more than nine hundred million subscribers and is available in more than seventy languages.<sup>3</sup> Facebook and hundreds of other social networking sites deploy terms of use as the latest method of conditioning access to digital data and information-based platforms.

Most, if not all, electronic standard forms used in social networking sites, assert the right to modify their rolling terms of service "at any time, for any reason, or for no reason at all."<sup>4</sup> The typical social media site

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1. "I feel that life is divided into the horrible and the miserable. That's the two categories. The horrible are like, I don't know, terminal cases, you know, and blind people, crippled. I don't know how they get through life. It's amazing to me. And the miserable is everyone else. So you should be thankful that you're miserable, because that's very lucky, to be miserable." ANNIE HALL (Rollins-Joffe Productions 1977) (quoting the character Woody Allen); see also Michael L. Rustad, SOFTWARE LICENSING: PRINCIPLES AND PRACTICAL STRATEGIES 292 (2010) (comparing this characterization of life by Woody Allen's character to quickwrap license agreements).

2. The term "sneak wrap" refers to online TOU agreements. See Ed Foster, "Sneak Wrap" May Be a Good Way of Defining the Maze of Online Policies, INFOWORLD, July 26, 1999, at 73 (describing sneak wrap as "where the vendor reserves the right to change the terms of a deal at any time, and sneak notice of the change right past you if they possibly can").

3. Facebook posts statistical information about the website online. *Newsroom*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited May 26, 2012) (reporting "901 million monthly active users at the end of March 2012").

4. *Terms of Service*, TAGGED, [http://www.tagged.com/terms\\_of\\_service.html](http://www.tagged.com/terms_of_service.html) (last updated Sept. 30, 2011).

claims the right to revise their terms of use “at any time without notice” to the consumer.<sup>5</sup> YouTube’s terms of service assert that those who merely use content are subject to its terms, conditions, and privacy policies and that it has the right to modify or revise its agreement.<sup>6</sup>

YouTube’s drive-by manifestation of assent by mere access to its platform resembles the way that bed bugs encounter hotel guests by hitchhiking in luggage, clothing, or personal effects. Nearly every social media site conditions user access to TOU agreements. This access is often one-sided and deceptively presented in the form of clickwrap, browsewrap, or a combination of these mass-market standard form documents.<sup>7</sup> As software companies go global, U.S.-style TOU agreements will face increased scrutiny by foreign courts and consumer protection agencies.

This Article calls for procedural and substantive reforms of U.S.-style TOU agreements by arguing that contract law is a misplaced metaphor for information-based products. Our argument that consumers need minimum adequate remedies in TOU agreements unfolds in four parts. Part I of this Article develops a typology of ideal TOU agreements, as they have evolved from shrinkwraps to more advanced forms such as clickwraps, browsewraps, and various hybrids (that combine browsewrap and clickwrap agreements). This part of the Article begins with an examination of the history of the software industry and the development of mass-market licenses, and examines how this legal invention enabled software publishers to turn their products into commodities.<sup>8</sup>

Part II explains why there is a chasm between U.S.-style TOU agreements and mandatory European private international law or

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5. *TOS, SOCIAL NETWORK REVIEWS*, <http://www.social-networkreviews.com/content/tos> (last visited May 26, 2012).

6. *Terms of Service, YOUTUBE* (June 9, 2010), <http://www.youtube.com/t/terms>.

7. Facebook calls its terms of use agreement, “Statement of Rights and Responsibilities.” *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/terms.php?ref=pf> (last updated Apr. 26, 2011). Users agree to litigate all claims in Facebook’s home court, Santa Clara County. In addition, they agree to indemnify Facebook if the social media site is sued because of postings that infringe third parties content or result in other lawsuits. *Id.* Additionally, the U.S.-based social network site AsianAve requires users at signup to agree to the site’s terms of service and privacy policy. *AsianAveJobs Terms of Service*, ASIANAVE, <http://www.asianave.com/jobs/tac.html> (last visited May 26, 2012).

8.

The term ‘mass market license’ is new and the definition must be applied in light of its intended and limited function. That function is to describe small dollar value, routine transactions involving information that is directed to the general public when the transaction occurs in a retail market available to and used by the general public. The term includes all consumer contracts and also some transactions between businesses if they are in a retail market.

UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT § 102(38) (1999) [hereinafter UCITA], available at <http://www.law.upenn.edu/bll/archives/ulc/ucita/ucita600c.pdf>.

procedural contracting rules. Part III discusses the many ways that substantive contract terms in social networking sites and software licenses clash with mandatory substantive consumer rules in the Eurozone. U.S.-style TOU agreements, structured as “pay now, terms later” in form, are considered unfair and unenforceable in the EU countries. Currently, many U.S. companies do not localize their standard form TOU agreements to comply with European law. To date, courts in Europe have invalidated key provisions in U.S.-style mass-market licenses.<sup>9</sup> Unless U.S. businesses localize their consumer TOU agreements, this trend will undoubtedly continue.

Part IV notes ten areas in which TOU agreements need reform and proposes specific ways to change these agreements such that social networking sites may export their products for consumer transactions around the world. Harmonizing TOU agreements and providing consumers with minimum adequate remedies will result in increased legal certainty and eliminate barriers for trade. The reforms to TOU agreements will ultimately benefit content providers, such as social media companies, although such companies may be reluctant to abandon their current one-sided contracting practices. Europe and the United States address the issue of TOU agreements with polar opposite approaches. To paraphrase Victor Hugo, the time has come for reforming U.S.-style TOU agreements for the consumer market.<sup>10</sup>

## I. THE QUIET REVOLUTION IN ONE-SIDED TERMS OF USE

### A. *The Birth of the Software Industry*

In the new millennium, software is an enveloping attribute of daily life

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In *Union Fédérale des Consommateurs v. AOL France*, AOL’s terms of service agreement was struck down. The AOL France case is not an isolated case but reflects a larger trend to challenge U.S. style software contracts. In Germany, consumers associations have challenged successfully the terms of CompuServe, AOL, and Microsoft: the first one was subject to a default judgment; the other two agreed to a binding cease-and-desist declaration. All three American companies have entered into settlement agreements agreeing to change their marketing practices. The implications of these cases are that practices validated by the Principles of Software Contract expose U.S. companies to a heightened litigation risk in Europe.

Michael L. Rustad & Vittoria Maria Onufrio, *The Exportability of the Principles of Software: Lost in Translation?*, 2 HASTINGS SCI. & TECH. L.J. 25, 79 (2010) (internal footnote omitted).

10. Victor Hugo’s original quote is as follows: “Nothing else in the world . . . not all the armies . . . is so powerful as an idea whose time has come.” *Victor Hugo’s Quotes*, FAMOUSPOETSANDQUOTES.COM, [http://famouspoetsandpoems.com/poets/victor\\_hugo/quotes](http://famouspoetsandpoems.com/poets/victor_hugo/quotes) (last visited June 3, 2012).

for consumers around the world. Software is also as American as apple pie and the Fourth of July. America invented the lightning rod, the cotton gin, the sewing machine, and software. Software is now the country's third largest industry.<sup>11</sup> As software is increasingly exported around the world, the United States remains the leading exporter.<sup>12</sup> In this era of mobile software applications, it is difficult to fathom that the term "software" was not even part of popular lexicon prior to 1970.<sup>13</sup> Back then, software was neither separately priced nor marketed, but was included with the hardware in a turnkey computer system.<sup>14</sup> The computer industry of the 1950s and 1960s was a sleepy backwater compared to today's dynamic software industry.<sup>15</sup> During the formative era of the computer industry, sales of software were incidental to a bundled transaction consisting of hardware, software, and documentation.<sup>16</sup> Computer industry moguls did not license software, nor did they even conceptualize code as an intangible asset of value separate from the mainframe computer system. In a turnkey system, the software accounted for only about three percent of the value of the computer system, as the industry was not yet marketing software as a

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11. Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 574 (1999) (stating that by 1996 computer software was ranked as the "third largest segment of the U.S. economy, behind only the automotive industry and electronic manufacturing") (citing Ronald Rosenberg, *Software Fastest Growing Industry*, BOSTON GLOBE, June 5, 1997, at D2). The software industry has been "projected to grow five times faster than the economy as a whole between 1996 and 2006 . . . ." *One Million New Positions Seen by 2006—Software Sets Pace for Future Job Growth*, ELEC. ENG'G TIMES, Jan. 5, 1998, at 1–2.

12. Robert W. Gomulkiewicz, *Getting Serious About User-Friendly Mass Market Licensing for Software*, 12 GEO. MASON L. REV. 687, 687–88 (2004) (concluding that end user licenses (EULAs) are here to stay for the foreseeable future despite hundreds of articles criticizing this form of contracting).

13. Today, "software is defined as '[a] set of computer programs, procedures, and possibly associated documentation concerned with the operation of a data processing system, e.g., compilers, library routines, manuals, circuit diagrams.'" Michael D. Scott, *Tort Liability for Vendors of Insecure Software: Has the Time Finally Come?*, 67 MD. L. REV. 425, 430 (2008) (quoting U.S. COPYRIGHT OFFICE, COMPENDIUM OF COPYRIGHT OFFICE PRACTICES II, 300–34 (1984)).

14. ROBERT W. GOMULKIEWICZ, XUAN-THAO NGUYEN & DANIELLE CONWAY-JONES, *LICENSING INTELLECTUAL PROPERTY: LAW AND APPLICATION* 303 (2008).

15. "Before NASDAQ and millionaire making IPO's, the computer industry occupied a reclusive corner of mainstream America. Before the 1980s, computers were large and expensive, thus restricting ownership to the government, universities and a few major corporations." Daniel B. Ravicher, *Facilitating Collaborative Software Development: The Enforceability of Mass-Market Public Software Licenses*, 5 VA. J.L. & TECH. 11, ¶. 9 (2000).

16. "Software was bundled along with the sale of hardware prior to the 1970s. The courts generally viewed software as incidental to the predominant purpose of selling mainframe computers." Michael L. Rustad, *Commercial Law Infrastructure for the Age of Information*, 16 J. MARSHALL J. COMPUTER & INFO. L. 255, 274 (1997) (discussing widespread method of transferring software).

separate product.<sup>17</sup> Because code was not viewed as a product to be commoditized, software licenses had yet to be invented.<sup>18</sup> Michael Madison explains how software licensing was invented as a response to the U.S. Department of Justice's antitrust lawsuit against IBM:

The technological and legal landscape began to change in the early 1970s. In 1969, the Justice Department filed its antitrust lawsuit against the industry giant, IBM, arguing that IBM's bundling of hardware and software was anticompetitive. IBM responded later that year by unbundling its charges for hardware, typically leased to customers, and software "services," now offered under separate pricing. Separate pricing for these "services" began as month-to-month leasing of the software, designed to avoid the implication that IBM was "selling" its code. For administrative reasons, this evolved into paid-up "licensing" of the software.

Functionally the code still was supplied with the machine, and initially the "licensing" business strategy was aimed primarily at responding to criticism of IBM's alleged anticompetitive marketing practices, not at nurturing protection for computer software as an independent economic sector.<sup>19</sup>

Throughout the 1960s and 1970s, IBM enjoyed a seventy percent market share of the mainframe computer system marketplace.<sup>20</sup> The U.S. Justice Department filed an antitrust lawsuit against IBM in 1969 that was not finally resolved until the early 1980s.<sup>21</sup> The takeoff point for the

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17. "The lack of concern for intellectual property in software may seem surprising, but as late as 1970 manufacturer-supplied programs accounted for only about 3 percent of the cost of a computer. There was little economic incentive to press for an appropriate IP regime for software protection." Martin Campbell-Kelly, *Not All Bad: An Historical Perspective on Software Patents*, 11 MICH. TELECOMM. & TECH. L. REV. 191, 210 (2005).

18.

Software licensing was not an issue in this era. The programming was typically completed through vertical integration within the entity of the computer owner. In other words, the computer programmer received compensation by her employer for her development of software. In return, the employer benefited not from selling the code to other entities, but by using it himself. Perhaps the largest reason why software licensing was not an issue in this era was that a market for copies of the same software did not yet exist.

Ravicher, *supra* note 15, at 11.

19. Michael J. Madison, *Reconstructing the Software License*, 35 LOY. U. CHI. L.J. 275, 311–12 (2003) (internal footnotes omitted).

20. Rachel Konrad, *IBM and Microsoft: Antitrust Then and Now*, CNET NEWS (June 7, 2000, 2:50 PM), [http://news.cnet.com/IBM-and-Microsoft-Antitrust-then-and-now/2100-1001\\_3-241565.html](http://news.cnet.com/IBM-and-Microsoft-Antitrust-then-and-now/2100-1001_3-241565.html).

21. *Id.*

software industry occurred in December of 1968, approximately six months before Neil Armstrong, Buzz Aldrin, and Michael Collins touched down on the Moon.<sup>22</sup> Notably, in 2009, both Apollo 11 and the software industry celebrated their fortieth anniversaries.<sup>23</sup> Unlike the anniversary of Apollo 11, which was celebrated with network television specials, the software industry's celebration received no fanfare. IBM made the business decision in December of 1968 to unbundle software from hardware in its turnkey products. This choice was a defensive response to the Justice Department's antitrust lawsuit, rather than a brilliant insight that software was valuable as a commodity.<sup>24</sup> Nevertheless, one of the unanticipated consequences of the unbundling decision was the rise of the software industry. Within a decade of IBM's decision to decouple code from hardware, revenues for the packaged software industry skyrocketed because new applications could be marketed and priced separately from the turnkey systems.<sup>25</sup> In sum, beginning in the late 1970s and early 1980s, companies began marketing software for the consumer marketplace.<sup>26</sup>

The first important application software was ADR's Autoflow and Informatics' Mark IV file management.<sup>27</sup> The packaged or boxed software

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22. RUSTAD, *supra* note 1, at 9.

23. *Id.*

24. See Madison, *supra* note 19, at 311 n.127 (arguing that "IBM's unbundling decision was made in anticipation of the Justice Department's" antitrust lawsuit and attributing licensing as a means of responding to the Justice Department suit as opposed to viewing software "as an independent economic sector"); see also, Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 543 n.679 (2011) (quoting Katharine Davis Fishman's book, citing a March 1969 internal memorandum that explicitly states that IBM's decision to unbundle was the result of pending litigation).

25. RUSTAD, *supra* note 1, at 9.

IBM introduced its first electronic computer, the model 701, in 1953. The term software had not yet been invented (it came into use about 1960) and the programs that IBM supplied for the 701 consisted of only a few hundred lines of code—a tiny fraction of the amount one would get with a domestic PC today.

Martin Campbell-Kelly, *supra* note 17, at 193–94 (internal footnotes omitted).

26. One of the earliest software applications was a spreadsheet called VisiCalc "released to the public in 1979, running on an Apple II computer." Mary Bellis, *The First Spreadsheet—VisiCalc—Dan Bricklin and Bob Frankston*, ABOUT.COM, <http://inventors.about.com/library/weekly/aa010199.htm> (last visited May 26, 2012). The first word processing program was released to the mass market in 1979. Mary Bellis, *WordStar—The First Word Processor*, <http://inventors.about.com/od/wstartinventions/a/WordStar.htm> (last visited May 26, 2012). See generally *A Rush of New Companies to Mass-Produce Software*, BUSINESS WEEK (Sept. 1, 1980) at 54–56.

27.

ADR took a very different approach to protecting its product, Autoflow. In the 1960s, almost all programming shops required programmers to document programs with a flowchart—a graphical representation of the logical flow of the program. Flowcharting was often the last, and most irksome, task of a programmer before moving on to the fresh field of a new assignment. Consequently, flowcharts often did

industry evolved in the late 1960s as a product of IBM's unbundling decision and exploded into a major industry upon IBM's release of the first personal computer in 1981.<sup>28</sup> Shortly after software publishers sold software in boxes, software publishers employed box top or shrinkwrap license agreements.

### B. *The Genesis of the Mass-Market License*

Software publishers and content creators typically use licensing as the chief method of transferring value for mass-market software products.<sup>29</sup> Comparable to the creation of the corporation or the limited liability company, the invention of the software license agreement is equally significant. "For broad distribution, individually negotiated contracts are not feasible, and the EULA is an efficient tool to set the terms for the standard, mass market transaction."<sup>30</sup> Licensing enables the software developer to prohibit assignments or transfers of their product so the initial purchaser may not resell or reproduce the copy.<sup>31</sup> The legal invention of licensing makes it possible for a software publisher to retain title to its information-based product and impose significant transfer restrictions. This enables the software publisher to slice and dice pricing based upon a complex array of variables. Software publishers have different fee schedules for databases depending upon whether the user is a large

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not get drawn, and maintenance costs increased. Martin Goetz, co-founder of ADR, designed Autoflow to produce flowcharts effortlessly by reading through a user's source program and from it automatically generating and printing a neatly formatted flowchart. It was a tour de force of programming that even today is an impressive piece of coding. The system cost about \$10,000 to develop, much more to promote; it paid off, however, as it went on to sell several thousand copies.

Campbell-Kelly, *supra* note 17, at 214 (internal footnotes omitted).

28. See *PC Magazine Celebrates The Fifteenth Anniversary of the PC: Special Issue Covers Fifteen Dynamic Years of the Computing, PCs of the Future and Conversations with The Founders of Microsoft and Intel*, PC MAGAZINE (Mar. 6, 1997) (discussing the evolution and future development of the PC).

29. "The paradigm contractual model for a transaction in intangible goods is a license agreement. Under the license, the creators of the product authorize the use of their work, but, because of its intangible nature, restrict its use." Sean F. Crotty, *The How and Why of Shrinkwrap License Validation Under the Uniform Computer Information Transactions Act*, 33 RUTGERS L.J. 745, 746 (2002); see also *Commercial Law Infrastructure For The Age of Information*, *supra* note 16, at 269 (discussing the rise of a new paradigm for software and contrasting licensing with the sale of goods).

30. Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335, 342 (1996).

31. See *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010) (holding that a software user is a licensee rather than an owner of a copy where the copyright owner specifies that the user is a licensee, and noting that this arrangement significantly restricts the user's ability to transfer the software and imposes use restrictions).



corporation, a community library, a small business, or a noncommercial user.<sup>32</sup> A company's licensing fees reflect not only the product chosen and the identity of the user but the number of users for the chosen products. Software publishers and content creators can charge different prices for licenses and retain exclusive reproduction and other rights under copyright law.<sup>33</sup> For enterprises, royalties are typically based upon such variables as the number of employees or the revenues of the licensee. The concept of a license gives the licensee permission to use software, information, or other content subject to conditions, permissions, and restrictions.<sup>34</sup>

Licenses have evolved as advanced contracts that come in many flavors depending upon whether they are for standard-form (without the possibility of negotiation), customized, or yet to be developed software.<sup>35</sup> By the 1980s, the software industry began giving customers conditional contract rights in the form of license agreements in contrast to the contracting form of sales or leases. Microsoft's business model was to contract with original equipment manufacturers of personal computers to preinstall their software. The distributor, in turn, would then sell the personal computer subject to an end-user license agreement (EULA).<sup>36</sup>

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32. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (noting that licensing enables software to be sold for a higher price for commercial users, while the same product may be priced lower if use restrictions are enforceable and the license is restricted to non-commercial use).

33. Copyright law gives a copyright owner remedies when any of the rights under 17 U.S.C. § 106 are violated, such as the exclusive right to distribute copyrighted material. Software code is copyrightable as literary works. *See Atari Games Corp. v. Oman*, 888 F.2d 878, 885 n.8 (D.C. Cir. 1989). If a licensee of software or other content exceeds the scope of the license, they are liable for infringement. *See generally SoftMan Products Co. v. Adobe Sys., Inc.*, 171 F. Supp. 2d 1075, 1082–83 (C.D. Cal. 2001) (holding that the defendant's piecemeal distribution of unbundled copies of Adobe software against terms of its EULA did not violate copyright law since the First Sale doctrine of 17 U.S.C. § 109 applied).

34.

A license is an agreement the terms of which entail a limited or conditional transfer of information or a grant of limited or restricted contractual rights or permissions to use information. A contract "right" is an affirmative commitment that a licensee may engage in a specific use, while a contract "permission" means simply that the licensor will not object to the use. Either can be the basis of a license.

UCITA § 102(37) (amended in 2002), *reprinted in* 10 Hawklund UCC Series UCITA § 102.

35. *See* Raymond T. Nimmer et al., *License Contracts Under Article 2 of the Uniform Commercial Code: A Proposal*, 19 RUTGERS COMP. & TECH L.J. 281, 294 (1993) (defining a "software contract" as "[a]n agreement that transfers or promises to transfer one or more rights in specific computer software, including the right to access, the right to use or to have used, the right to modify, the right to copy or the right to otherwise employ the computer software").

36. Microsoft's practice was to enter into distribution agreements with Original Equipment Manufacturers (OEMs) such as personal computer makers like Gateway. OEMs pre-installed the Microsoft Windows system into their personal computers. Consumers did

The “fundamental difference [between a license and an assignment] is that, while licenses and assignments both focus on rights in, or use of, information, in an assignment the original rights owner tends to divest itself of rights in the subject matter . . . .”<sup>37</sup> In contrast, the licensor “retains more rights in the subject matter of the license.”<sup>38</sup> Since the 1990s, “the American economy [has] exploded with new technology and a proliferation of software and Internet companies.”<sup>39</sup> Tablet computers such as smartphones and other mobile devices “let consumers work and surf the web on the move.”<sup>40</sup> In effect, the software industry’s invention of licensing as a way of commodifying software as a separate product was a monumental decision that reshaped the U.S. economy.

Software licensing has evolved as a leading means of transferring value in an increasingly information-based economy.<sup>41</sup> In the new information-based economy, access to software, data, and entertainment products challenges the sale or lease of durable goods as the economic base. In the 1980s, software publishers began using licensing as a way to bypass copyright law’s first sale doctrine, first articulated by the Supreme Court in 1908.<sup>42</sup> The first sale doctrine allows owners of copies of copyrighted works to resell their copies.<sup>43</sup> In *Microsoft Corp. v. Harmony*

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not directly license their software from Microsoft but through their OEMs. Kurtis A. Kemper, *Resale and Use of Licensed Technology*, 2 COMPUTER AND INFO. L. DIGEST § 9-6 (2d ed. 2010) (updated Nov. 2010).

37. RAYMOND T. NIMMER, *LICENSING OF INTELLECTUAL PROPERTY AND OTHER INFORMATION ASSETS* 3 (2d ed. 2004).

38. *Id.*

39. Tanya Patterson, Note, *Heightened Securities Liability for Lawyers Who Invest in Their Clients: Worth the Risk?*, 80 TEX. L. REV. 639, 639 (2002).

40. *Dell and Hewlett-Packard: Rebooting Their Systems*, THE ECONOMIST, Mar. 12, 2011, at 73.

41.

Worldwide enterprise software revenue is on pace to surpass \$232 billion in 2010, a 4.5 percent increase from 2009 revenue of \$222.4 billion, according to the latest forecast from Gartner, Inc. The enterprise software market is projected for continued growth in 2011 with revenue forecast to reach \$246.6 billion. Through 2014, the market is expected to reach \$297 billion at a five-year compound annual growth rate (CAGR) of 6 percent.

Press Release, Gartner, Gartner Says Worldwide Enterprise Software Revenue to Surpass \$232 Billion in 2010 (Sept. 20, 2010).

42. The first sale doctrine of copyright law gives the owner of a lawfully made copy the power to “‘sell or otherwise dispose of the possession of that copy’ without the copyright holder’s consent.” *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 96 n.7 (3d Cir. 1991) (quoting *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908) (holding that a copyright owner’s exclusive distribution right is exhausted after the owner’s first sale of a particular copy of the copyrighted work)).

43. Section 109 of the Copyright Act states in relevant part: “the owner of a particular copy . . . lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy . . . .” U.S. Copyright Act,

*Computers & Electronics*,<sup>44</sup> the court held that Microsoft's software was not subject to the first sale doctrine since it licensed rather than sold its products. If a licensee of a software product resells a product, it infringes on the copyright because this will typically exceed the scope of the license agreement.<sup>45</sup> The impetus behind licensing is that the same software product can be licensed to multiple markets with varying restrictions and conditions on end-users.<sup>46</sup> If the first sale doctrine can be bypassed, software publishers can calibrate pricing on such variables as commercial versus non-commercial use, number of computers on which the customer is licensed to install the software, and territorial restrictions. With licensing, there is a "first license" but not a "first sale."<sup>47</sup>

Social networking TOU agreements grew out of the licensing paradigm that enabled the software industry to become America's third largest industry in just a few decades.<sup>48</sup> "Terms of use" agreements evolved from shrinkwrap license agreements and both contracting forms enable the content creator to side step the first sale doctrine of U.S. copyright law.<sup>49</sup> Software licenses, unlike sales of goods, always include a close relationship with the underlying intellectual property rights protecting code.<sup>50</sup> TOU agreements masquerade in the clothing of contracts binding

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17 U.S.C. § 109(a) (2006).

44. *Microsoft Corp. v. Harmony Computers & Elecs.*, 846 F. Supp. 208 (E.D.N.Y. 1994).

45. *See, e.g., Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1104 (9th Cir. 2010) (holding that Vernor infringed Autodesk's copyright when he resold software products on eBay).

46. MARK A. LEMLEY ET. AL., *SOFTWARE AND INTERNET LAW*, 254–55 (4th ed. 2011) (explaining that licensing enables the licensor to control price discrimination that allows arbitrage).

47. Under the first sale doctrine, once the copyright owner sells a copy of the copyrighted work, the owner has no continuing right to control either the use or distribution of a particular copy of a copyrighted work. *See id.* at 254 (discussing 17 U.S.C. § 109, the first sale provision of the Copyright Act).

48. Steve Lohr, *Study Ranks Software as No. 3 Industry*, N.Y. TIMES, June 3, 1997, at D2 (citing study by Nathan Associates funded by the Business Software Alliance); *see also* Garon, *supra* note 11, at 574 (stating that by 1996 computer software was ranked as "the third largest segment of the U.S. economy, behind only the automotive industry and electronic manufacturing" and growing "five times faster than the economy as a whole between 1996 and 2006 . . .").

49. Bradley E. Abruzzi, *Copyright, Free Expression, and the Enforceability of "Personal Use-Only" and Other Use-Restrictive Online Terms of Use*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 85, 105 (2010) (arguing that website terms of service evolved from shrinkwrap licensing practices).

50. Steven A. Heath, *Contracts, Copyright, and Confusion: Revisiting the Enforceability of 'Shrinkwrap' Licenses*, 5 CHI-KENT INTELL. PROP. 12, 13 (2005) (arguing that software licensing was invented to avoid "governmental scrutiny over anti-competitive practices at large in the computing industry" as well as to side-step the first sale doctrine of the U.S. Copyright Act).

the end user to terms dictated entirely by the software publisher.<sup>51</sup> Terms of Service Agreements are the latest stage in pro-seller standard form contracts where the issuer neither reads nor understands their terms.<sup>52</sup>

### C. *The Evolution of Terms of Use*

Internet-related TOU agreements are the latest stage in the evolution of the adhesionary contract where the consumer adheres to the terms of the stronger party, the software maker.<sup>53</sup> The mass-market software license was invented shortly after IBM's decoupling software from hardware in 1969.<sup>54</sup> Traditionally, software was included as part of a mainframe computing system. Hardware and software were conceptualized as a single product in the mainframe computer era of the 1940s through the late 1960s. IBM's decoupling of software as a separate product made it possible to price and market computer code as a commodity.<sup>55</sup> "In the early 1980's the number one method of software licensing was 'do nothing and hope for the best.'"<sup>56</sup> Some computer manufacturers employed technological solutions

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Sites condition access to their content on visitors' acceptance of these TOU, which generally assume an agreement between the website and user that is enforceable by state contract law. TOU may be deployed to all sorts of purposes. They may set the terms and conditions for online purchases; they may limit the site's liability for damage that its content and services cause to users. A site may, through its TOU, obtain the rights to use and reproduce content users post to a website, for example, comments to a blog. And TOU may condition or restrict the subsequent uses a site visitor may make of content that he or she access[es] on the website.

Bradley E. Abruzzi, *supra* note 49, at 86.

52. The limited empirical studies demonstrate beyond my examples that EULAs are tilted in favor of the seller. See Florencia Marotta-Wurgler, *What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. EMPIRICAL LEGAL STUD. 677, 703 (2007) (finding that End User License Agreements "are almost always more pro-seller than the default rules of the UCC").

53. The one-sided nature of consumer software license agreements reflecting the interests of the dominant party has been part of the American law of contracts since the 1970s. David Slawson observed that in 1971:

[T]he overwhelming proportion of standard forms are not democratic because they are not, under any reasonable test, the agreement of the consumer or business recipient to whom they are delivered. Indeed, in the usual case, the consumer never even reads the form, or reads it only after he has become bound by its terms.

W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971).

54. Michael J. Madison, *Reconstructing the Software License*, 35 LOY. U. CHI. L.J. 275, 310 (2003).

55. Peter L. Briggs, *IBM Unbundling Biggest Software Event of 1989*, COMPUTER WORLD (Dec. 24, 1969).

56. *A Brief History of Software License Management: The Early Years (1988–1992)*, REPRISE SOFTWARE, <http://www.reprisesoftware.com/blog/2007/01/a-brief-history-of->

such as copy-protection technologies, rather than rely solely upon contract to prevent software from being used on more than one computer.<sup>57</sup> As software became mass-marketed, it became impractical for software contracts to be individually drafted and negotiated.<sup>58</sup>

The mass-market license was a useful legal invention that enabled the commoditization of software as a digital product where the licensor could impose conditions of use and other restrictions. Michael Madison recounts how customers acquiesced to licensing even though it imposed restrictions not found in the sale of goods:

Customer acquiescence in initial licensing practice was motivated at least as much by business needs as by intellectual property considerations. Even today, software consumers participate in licensing transactions because they are effectively required to in order to acquire use of needed computer software. And the normative benefits of the alleged licensing “custom” have never been more questioned as a public policy matter.<sup>59</sup>

In the prepackaged software industry, software producers typically enter into end-user license agreements (“EULAs”) in which third parties distribute licensed software in a given market.<sup>60</sup> While software licenses are a useful invention in permitting the commoditization of digital products, these EULAs leave consumers with no meaningful consumer protection or significant remedies.<sup>61</sup>

Since the 1980s, software makers, database developers, and website creators invented a number of groundbreaking contracting forms that deviated from the customary paradigm of entering into agreements: offer, acceptance, and consideration. TOUs for the consumer market are the most

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software-license-management-2/ (last visited June 4, 2012).

57.

In addition, on PCs, a number of copy-protection technologies were popular (I say popular in the sense that they were used a great deal, not that people loved using them.) On engineering workstations, software was often “node-locked” so that it would run on only one computer, usually identified by a machine serial number (or “host ID”) which was an integral part of the workstation.

*Id.*

58. “The mass marketing of software ultimately ensured that ‘the formal signed software license had become incompatible with the distribution of personal computer software . . . . Ease of purchase became a key component in winning the business.’” Heath, *supra* note 50, at 14 (ellipsis in original) (citation and internal quotation marks omitted).

59. Madison, *supra* note 19, at 316 (citation omitted).

60. *See generally* Louis Columbus, ADMINISTRATOR’S GUIDE TO E-COMMERCE: A HANDS-ON GUIDE TO SETTING UP SYSTEMS AND WEBSITES USING MICROSOFT BACKOFFICE 158 (Howard W. Sams & Co., 1999) (describing how software publishers use third parties to contract with consumers to distribute mass-market software).

61. *See* Gomulkiewicz, *supra* note 12, at 691 (describing academic and judicial criticism of mass-market licenses).

recent stage in the progression of the adhesion contract, in which the consumer adheres to the terms of the controlling party, the software publisher, or maker.<sup>62</sup> The next section develops a typology of consumer TOUs and their concepts and methods. The commoditization of software, website content, and social network sites employ terms of service to create what is in effect a liability-free zone through warranty disclaimers and remedy limitations.

*D. A Typology of Adhesive TOUs*

Beginning in the 1980s, the U.S. software industry invented a number of standard form EULAs, including shrinkwraps, clickwraps, installwraps, browswraps, and TOUs most recently imported by social media websites.<sup>63</sup> The idea that a consumer agrees to current terms and conditions for which they have no notice is a legal fiction. The late Arthur Leff was the first to reconceptualize standard form documents as consumer products and unmasked the empirical reality that standard form documents were disguised in the clothing of contract, but were in fact products. One-sided, asymmetrical standard forms were not truly “the product of a cooperative process, but the creation (essentially) of only one of the parties.”<sup>64</sup> With adhesion contracts, the weaker party has no choice but to acquiesce to the terms of the stronger party; the transaction is “one not of haggle or cooperative process but rather of a fly and flypaper.”<sup>65</sup> Professor Leff observed that, “[t]he minute you shift your attention from the common element upon which your classification is based to some other, previously ignored, your classification explodes. Or at least it ought to.”<sup>66</sup> Four decades ago, David Slawson went even further contending that standard-form contracts were not really contracts at all: “The conclusion to which all this leads is that practically no standard forms, at least as they are customarily used in consumer transactions, are contracts.”<sup>67</sup>

By the 1970s, more than ninety percent of all contracts were take it or

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62. The one-sided nature of consumer software license agreements reflecting the interests of the dominant party has been part of the American law of contracts since the 1970s. David Slawson observed in 1971 that “the overwhelming proportion of standard forms are not democratic because they are not, under any reasonable test, the agreement of the consumer or business recipient to whom they are delivered. Indeed, in the usual case, the consumer never even reads the form, or reads it only after he has become bound by its terms.” Slawson, *supra* note 53, at 530.

63. Mass-market software takes diverse forms such as shrinkwrap, browswrap, clickwrap, and installwrap. See RUSTAD, *supra* note 1, at 291–344.

64. Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 143 (1970).

65. *Id.* (citation omitted).

66. *Id.* at 133.

67. Slawson, *supra* note 53, at 544.

leave it standard form terms.<sup>68</sup> Legal commentators are critical of TOUs targeting consumers that have hidden terms and questionable methods of contract formation:

[T]he contract formation process is flawed; the “take it or leave it” nature of the process is unfair; the “pay first, terms come later” sequence of events is flawed and unfair; it is too easy to hide terms; the method of contracting improperly extends intellectual property protection; this use of contracts is preempted either by the Copyright Act or the United States Constitution.<sup>69</sup>

In some cases, terms of use are presented in a way that makes it impossible for users to manifest assent, let alone understand what terms to which they have assented.<sup>70</sup> The grandfather of the TOU is the shrinkwrap license agreement. Standard-form licensing agreements morphed into terms of use such as clickwrap, browsewrap, and the terms of use widely used in social networking sites. Table One presents the standard form TOUs that have evolved since the 1980s.<sup>71</sup>

TABLE ONE: TYPOLOGY OF QUICKWRAP TERMS OF USE

FORM OF TERMS OF USE FORMS	FORMATION PRINCIPLE	CONTROVERSIAL ASPECTS
SHRINKWRAP OR BOX TOP MASS-MARKET LICENSES	The ‘shrinkwrap license’ derives its name from the widespread software industry practice of printing mass-market	Shrinkwrap imposes restrictions that a consumer may discover only <i>after</i> opening and installing the software; typical shrinkwrap

68. *Id.*

69. Gomulkiewicz, *supra* note 12, at 691 (citation omitted).

70. Buzznet is a photo, journal, and video-sharing social media network, owned by Buzz Media. This social network site enables its members to participate in communities that are created around ideas, events, and interests such as celebrities. Buzznet, for example, signs users up without referring to terms of service or terms of use. BUZZNET, <http://www.buzznet.com> (last visited June 4, 2012). CouchSurfing, another U.S. social media website, requires users to submit to their privacy policy, but does not refer to it in its basic terms of use. COUCHSURFING, <http://www.couchsurfing.org> (last visited June 4, 2012).

71. “When most people think about software licensing, they think about standard form mass market EULAs. These come in a variety of forms with a variety of colorful names such as ‘shrink wrap,’ ‘boot screen,’ ‘click-wrap,’ or ‘browse wrap’ (or, less charitably, as ‘sneak wrap’ or ‘autistic’ licenses).” GOMULKIEWICZ, *supra*, note 14, at 311 (2008).

	licenses beneath the shrinkwrap or including them in the box containing products. Shrinkwrap license agreements predicated the manifestation of assent on whether the consumer broke open the plastic wrapping surrounding a box containing software.	disclaims all warranties and limits remedies divesting the user of a meaningful adequate remedy.
CLICKWRAPS OR INSTALLWRAPS	Users adhere to the terms of clickwraps or clickstreams by clicking <sup>73</sup> on an icon “I agree.” Clicking the agreement is legally significant in that it indicates the user’s manifestation of assent to be bound by terms of use or other conditions of using content; installwraps employ pop-up screens during installation of software. User must click “I agree” for the installment <sup>74</sup> to proceed.	The mere act of downloading software does not indicate assent to be bound by terms of license agreement, where a link to such terms is not conspicuously located.
BROWSEWRAP	A “browsewrap” agreement is an alleged contract that	Courts hold that consumers are bound despite the fact that he

72. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996).

73. Specht v. Netscape Commc’ns. Corp., 150 F. Supp. 2d 585, 593–94 (S.D.N.Y. 2001) (“A click-wrap license presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon.”) (citation omitted).

74. Christian H. Nadeau, *Open Source Licensing: Virus or Virtue?*, 10 TEX. INTELL. PROP. L.J. 349, 362 n.53 (2007) (describing a clickwrap agreement as one “requiring the user to click an ‘accept’ button before the installation will conclude (sometimes called an ‘installwrap’ license)”).



	binds anyone who views a website to the site's "terms of use."	or she neither read the terms of use nor in any way affirmatively indicated his or her assent to be bound; the terms are as onerous as in shrinkwrap and clickwrap.
TERMS OF USE	Social networks and other websites often employ a hybrid that combines <sup>75</sup> the browsewrap with some affirmative act such as registration. A minority of social networking sites use a clickwrap in conditioning access to their services.	Social networking sites maintain that Terms and Conditions or Terms of Use bind a user by using the site. Users are instructed that if they do not agree to be bound by the terms of use, that they stop using the site immediately. Many social networking sites also ask users to agree to terms of use upon registration.

### 1. Shrinking Rights in Shrinkwrap TOUs

The software industry developed shrinkwrap, the earliest form of quickwrap, in the 1970s and vendors were widely using this contracting

75. Facebook, by far the largest social network site, structures its terms of use as a browsewrap with the following introductory clause: "By using or accessing Facebook, you agree to this Statement." *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/terms.php?ref=pf> (last updated April 26, 2011). Badoo, a U.K.-based social network site popular in Europe and Latin America instructs users that their "[t]erms apply whenever you visit Badoo, whether or not you have chosen to register with us, so please read them carefully. By accessing, using, registering for or receiving services offered on Badoo (the 'Services') you are accepting and agreeing to be bound by the Terms." *Badoo's Terms and Conditions of Use*, Badoo, <http://www.badoo.com/terms> (last updated May 15, 2012) (emphasis omitted).

76. Friendster, a social network site popular in Southeast Asia, but not in the United States or Europe, employs a clickwrap agreement to bind users. Friendster instructs users to follow "the instructions on the 'Sign Up' page and checking the box labeled 'I agree to Friendster's terms of service.'" *User Terms and Conditions*, FRIENDSTER, [http://friendster.com/user\\_terms\\_and\\_conditions](http://friendster.com/user_terms_and_conditions) (last visited June 4, 2012).

form by the early 1980s.<sup>77</sup> In the early years of the software industry, publishers boxed software with shrinkwrap plastic surrounding the package. The shrinkwrap license receives its name from the practice of vendors printing shrinkwrap licenses beneath the shrinkwrap or on the box containing software products. While some shrinkwrap license agreements are printed on the outside of the box, many cannot be seen until the software is paid for and the box opened. Still other software vendors display the shrinkwrap license agreement only after the software is booted up and the terms are displayed on the user's screen. The first paragraph of a shrinkwrap agreement states that the opening of the package indicates acceptance of the license terms.<sup>78</sup> "Vendors intend that, by opening the plastic wrap and actually using the software, customers will bind themselves to the terms of the shrinkwrap license."<sup>79</sup> In Justice Holmes' famous 1897 essay, "*The Path of the Law*," he discusses the atavistic contracting practices of early common law:

But in the case of a bond the primitive notion was different. The contract was inseparable from the parchment. If a stranger destroyed it, or tore off the seal, or altered it, the obligee could not recover, however free from fault, because the defendant's contract, that is, the actual tangible bond which he had sealed, could not be produced in the form in which it bound him.<sup>80</sup>

The moment of the making of a shrinkwrap agreement is when the "customer removes the plastic or cellophane wrapping" from the box.<sup>81</sup> Shrinkwrap licenses have three common features: "(1) notice of a license agreement on product packaging (*i.e.*, the shrinkwrap), (2) presentation of the full license on documents inside the package, and (3) prohibited access to the product without an express indication of acceptance."<sup>82</sup>

The software industry developed the shrinkwrap TOUs, which was the earliest form of quickwrap.<sup>83</sup> Software publishers developed the

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77. "Exactly who first used a shrinkwrap license provision in a software transaction is a fact lost in the arcane mists of computer history. Certainly, they were a feature of the licensing landscape by the early 1980s." Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1241 n.5 (1995); *see also* Heath, *supra* note 50, at 15 (arguing that "[m]ass marketed software licenses . . . enjoy a pedigree stretching back to at least the early 1980s.") (citation omitted).

78. This example is drawn from *Morgan Labs., Inc. v. Micro Data Base Sys. Inc.*, No. C96-3998 TEH, 1997 WL 258886, at \*3 (N.D. Cal. Jan. 22, 1997).

79. Lemley, *supra* note 77, at 1241-42.

80. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 473 (1897).

81. *Salco Distribs. LLC v. Icode, Inc.*, No. 8:05-CV-642-T-27TGW, 2006 WL 449156, at \*5 n.5 (M.D. Fla. Feb. 22, 2006) (citing *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996)).

82. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 428 (2d Cir. 2004).

83. RUSTAD, *supra* note 1, at 295.

shrinkwrap mass-market document to reallocate the risk of defective software to the consumer or user.<sup>84</sup> Software publishers have been triumphant in creating a contractually based “liability-free” zone to insulate themselves from paying consequential damages or other significant remedies in the event that defective software failed causing damages to the user’s computer system. Hence, defectively designed software costs consumers and other users millions of dollars per year in consequential damages.<sup>85</sup>

The birthday of the first shrinkwrap agreement, or its inventor, is mysterious.<sup>86</sup> Still, scholars agree that shrinkwraps were in wide use by the 1980s and the software license has evolved over the past three decades.<sup>87</sup> “Exactly who first used a shrinkwrap license provision in a software transaction is a fact lost in the arcane mists of computer history.”<sup>88</sup> Steven Heath tells the story of how the shrinkwrap license agreement came to be widely used by the software industry:

This came to be known as a ‘shrinkwrap’ license, by simple virtue of the fact that it was physically included with the package’s cellophane wrapping. Three initial forms were common: the ‘envelope license,’ with the license printed on the exterior of a sealed envelope containing the product (usually a CD-ROM or disk); the ‘box-top’ license; read before opening a sealed box containing the product; and the ‘referral license,’ where the user is informed of a license that *should* be read before the manufacturer’s seal is broken. Being an innovative response to changing market conditions, the shrinkwrap license has since

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84. Scott, *supra* note 13, at 427 (arguing that software publishers use mass market licenses to reallocate the risk of bad software to the users).

85.

Software vulnerabilities cost businesses and consumers tens of billions of dollars each year. Every day brings news of freshly discovered security flaws in major software products. While Microsoft, due to its prominence in the operating system market, gets the brunt of the criticism for these flaws, there are many other companies whose software is also targeted for security-related complaints.

*Id.* at 426–27 (citations omitted).

86. Lemley, *supra* note 77, at 1241 (noting that it is unclear who first used the first shrinkwrap license and its origins are hidden from history).

87. *Id.*

As custom, therefore, software licensing has a historical pedigree that stretches to a maximum of thirty years. The structure and purpose of software ‘licenses’ that developed at that time, which had the effect (if not the intention) of opening the computer industry and facilitating competition, in fairness cannot be compared to contemporary licensing practice, which developers rely on to limit competition.

Madison, *supra* note 19, at 312 (citation omitted).

88. Lemley, *supra* note 77, at 1241 n.5.

been refined, as symbolized by the emergence of electronic ‘click-wrap’ and ‘browse-wrap’ licenses.<sup>89</sup>

In the mid-1990s, mass-market TOUs “experienced a sea change,” where the “majority of courts . . . have enforced shrinkwrap licenses . . . .”<sup>90</sup> Prior to the mid-1990s, U.S. courts categorically rejected the software publisher’s theory that cracking open shrinkwrap was an enforceable license.<sup>91</sup>

Today, the widespread outlook of American courts is that shrinkwrap licenses are “enforceable unless their terms are objectionable on grounds applicable to contracts in general.”<sup>92</sup> Shrinkwraps are standard forms masquerading in the clothing of contract, but are not truly contracts. Mark Lemley argues, “[s]hrinkwraps are not contracts at all in any meaningful sense of the word. Rather, they are unilateral lists of terms that courts may choose to abide by in some circumstances.”<sup>93</sup> A “reverse unilateral contract” elevates form over substance.<sup>94</sup> For example, in *Vault Corp. v. Quaid Software, Ltd.*,<sup>95</sup> the Fifth Circuit struck down a shrinkwrap license because the federal Copyright Act preempted such a contract. The judicial surge against shrinkwrap quickly turned in 1996 when the Seventh Circuit upheld the enforceability of a shrinkwrap license that the software publishers structured as “money now, terms later.”<sup>96</sup> Judge Frank

89. Heath, *supra* note 50, at 15 (emphasis in original) (citation omitted).

90. Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459–60 (2006) (surveying case law and concluding that prior to the mid-1990s, courts generally struck down shrinkwrap license agreements); *see, e.g.*, *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255, 270 (5th Cir. 1988) (affirming district court decision ruling that shrinkwrap was an unenforceable contract of adhesion and that the Louisiana’s Software License Enforcement Act validating shrinkwrap was preempted by the U.S. Copyright Act); *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 766 (D. Ariz. 1993) (refusing to enforce terms of a shrinkwrap license because “whether the terms of the license agreement are treated as proposals for additional terms under U.C.C. § 2-207, or proposals for modification under U.C.C. § 2-209, the terms of the license agreement are not a part of the agreement between the parties.”) (citation omitted).

91. Lemley, *supra* note 90, at 459.

92. *ProCD, Inc., v. Zeidenberg*, 86 F.3d 1447, at 1449 (7th Cir. 1996). *See generally* Lemley, *supra* note 90, at 459 (describing how no court enforced a shrinkwrap in the 1990s but today, “more courts and commentators seem willing to accept the idea that if a business writes a document and calls it a contract, courts will enforce it as a contract . . .”).

93. Lemley, *supra* note 77, at 1291.

94. *Id.* at 1241 (citation and internal quotation marks omitted).

95. *Vault Corp.*, 847 F.2d at 270 (holding a Louisiana state statute validating shrinkwrap license terms to be preempted by the federal copyright law); Dennis S. Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 U. DAYTON L. REV. 511, 532 (1997) (“Wherever the line is ultimately drawn in distinguishing between nonpreempted bargained terms and preempted adhesion terms . . . most, if not all, shrinkwrap license terms purporting to expand federal copyright rights in widely distributed works should be preempted.”).

96. *ProCD, Inc.*, 86 F.3d at 1452; *see Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149

Easterbrook, writing for the court, reasoned that shrinkwrap was a useful legal invention: “Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike.”<sup>97</sup>

Today, the dominant view of American courts is that shrinkwrap licenses are broadly enforceable.<sup>98</sup> Shrinkwrap license agreements are classic examples of flypaper contracts where the stronger party divests consumers of “all meaningful warranties and remedies, and the manufacturer reallocates the risk of loss to the user community for all failures of performance.”<sup>99</sup>

## 2. Clickwraps and Installwraps

Clickwrap evolved as an internet-related contract evolving out of shrinkwrap agreements.<sup>100</sup> The typical clickwrap agreement will require the user to express agreement by clicking the “I Agree” button. If they do not click and agree, they are asked to leave the site.<sup>101</sup> The clickwrap

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(7th Cir. 1998) (upholding a rolling contract requiring consumers to submit to arbitration because they had entered into an enforceable contract only after retaining the personal computer beyond the thirty-day period specified in the agreement); *see also* *Brower v. Gateway 2000*, 676 N.Y.S.2d 569, 575 (N.Y. App. Div. 1998) (upholding Gateway’s accept or return contract but remanding the case on the issue of whether the Federal Arbitration Act procedures applied rather than the ICC rules). *But see* *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (refusing to enforce Gateway’s accept or return computer contract).

97. *ProCD, Inc.*, 86 F.3d at 1451 (citations omitted).

98. *Id.* at 1449; *see Hill*, 105 F.3d at 1150 (holding a shrinkwrap agreement including a mandatory arbitration clause to be enforceable); *Koresko v. RealNetworks, Inc.*, 291 F. Supp. 2d 1157, 1162–63 (E.D. Cal. 2003) (enforcing a shrinkwrap agreement). *See generally* Lemley, *supra* note 90, at 459 (describing how no court enforced a shrinkwrap agreement in the 1990s but today, “more courts and commentators seem willing to accept the idea that if a business writes a document and calls it a contract, courts will enforce it as a contract . . .”).

99. Michael L. Rustad & Thomas H. Koenig, *The Tort of Negligent Enablement of Cybercrime*, 20 BERKELEY TECH. L.J. 1553, 1562 (2005) (citation omitted).

100. *See, e.g., Stomp, Inc. v. NeatO, LLC*, 61 F. Supp. 2d 1074, 1081 n.11 (C.D. Cal. 1999) (noting that clickwrap evolved out of shrinkwrap). *See generally* Abruzzi, *supra* note 49, at 105 (arguing that website terms of service evolved out of shrinkwrap licensing practices).

101. Courts have validated this method of entering into a license agreement so long as the user has adequate notice and an opportunity to manifest assent (or disapproval) of the terms. *See, e.g., Forrest v. Verizon Commc’ns, Inc.*, 805 A.2d 1007, 1010–11 (D.C. Cir. 2002) (holding that clickwrap agreement was enforceable and that adequate notice was provided of clickwrap agreement terms where users had to click “accept” to agree to the terms in order to subscribe); *Koresko*, 291 F. Supp. 2d at 1162–63 (ruling that consumer that clicked box on the screen marked, “I agree” on website manifested assent to the terms of a clickwrap agreement); *Stomp, Inc.*, 61 F. Supp. 2d at 1081 (upholding clickwrap agreement

standard form displays terms electronically and the user manifests assent by clicking the acceptance button. Software and other information is distributed with an end user “clickwrap” or “clickstream” license.<sup>102</sup> Like the shrinkwrap, the clickwrap deploys the metaphor of contract in its terms of use or conditions by premising the manifestation of assent upon clicking once or twice on an “I agree” icon or radio button. As with shrinkwrap, there is no manifestation of assent to specific terms, but only “blanket assent” to terms skewed disproportionately in favor of the licensor.<sup>103</sup>

Clickwraps have generally been successful in reducing risk for content providers arising out of internet consumer transactions.<sup>104</sup> Lemley’s 2006 survey of mass-market licenses found that “[e]very court to consider the issue has found ‘clickwrap’ licenses” to be a legitimate contracting form.<sup>105</sup> Courts presumptively enforce EULAs so long as the consumer has an opportunity to review the terms and manifest assent even if there is no evidence that the terms were read.<sup>106</sup>

### 3. Browsewrap TOUs

A “browsewrap” is an internet-related quickwrap where a consumer purportedly assents by simply browsing the website and not by clicking on an agreement through a hyperlink or radio button.<sup>107</sup> A federal court

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where user assented to terms by clicking “accept” button).

102. Most TOUs require the user to manifest assent to the TOU by clicking on the “I agree” icon or a hyperlink before they can proceed to download the software. *See, e.g., Moore v. Microsoft Corp.*, 741 N.Y.S.2d 91, 92–93 (N.Y. App. Div. 2002) (upholding TOU).

103.

Both non-negotiated written agreements and clickwraps lack indicia of bargaining. The user is offered contractual terms on a “take-it-or-leave-it” basis and the terms are generally more favorable to the licensor than to the licensee. Provided that the terms are not unconscionable, however, courts have tended to enforce both types of agreements.

Nancy S. Kim, *The Software Licensing Dilemma*, 2008 B.Y.U. L. REV. 1103, 1126 (internal citations omitted).

104. “No consumer was awarded punitive damages in a products liability action for bad software, the transmittal of a virus, or a faulty Internet security product.” Michael L. Rustad, *Punitive Damages in Cyberspace: Where in the World is the Consumer?*, 7 CHAP. L. REV. 39, 47 (2004) (concluding from an empirical study of early cyberspace-related lawsuits from 1992–2002 that liability for defective software or information-based products was non-existent).

105. Lemley, *supra* note 90, at 459.

106. Michael L. Rustad & Diane D’Angelo, *The Path of Internet Law: An Annotated Guide*, 2011 DUKE L. & TECH. REV. 12, 24 (“Courts generally will enforce EULAs so long as the ‘terms are clear and acceptance is unambiguous, regardless of whether [the user] actually reads them.’”) (alteration in original) (citation omitted).

107. A number of courts have enforced browsewrap even though they do not require the

described browsewrap as taking divergent forms, but its predicate is that this contracting form does not require the user to manifest assent because “[a] party instead gives his assent simply by using the website.”<sup>108</sup> In contrast to a clickwrap that “appears on the screen when the CD or diskette is inserted and does not let the consumer proceed without indicating acceptance . . . a browse wrap license is part of the web site and the user assents to the contract when the user visits the web site.”<sup>109</sup> The term browsewrap applies when a consumer is not required to click a radio button acknowledging the terms.<sup>110</sup> The notice that supposedly binds the consumer may be a web page, link, or a small disclaimer on a web page that gives notice that the visitor’s use of a website is conditional on his or her agreeing to restrictive terms or conditions.<sup>111</sup> Ronald Mann and Travis Siebeneicher conducted an empirical study of the terms and conditions of the online contracts of 439 of the 500 largest Internet retailers.<sup>112</sup> Most internet retailers used browsewrap agreements as opposed to other quickwraps, such as clickstream or installwraps.<sup>113</sup> Mann and Siebeneicher’s empirical study found the following percentages of pro-seller or licensor terms:

# of Cases Percentage

Disclaimer of Implied Warranties	245	49%
Limitation of Damage Types	243	49%
Choice of Law	201	40%
Choice of Forum	159	32%

user to click a specific box. These courts have found terms of use agreements binding the user through use of the website. Courts considering browsewrap agreements have held that “the validity of a browsewrap license turns on whether a website user has actual or constructive knowledge of a site’s terms and conditions prior to using the site.” *Sw. Airlines Co. v. BoardFirst, L.L.C.*, 2007 WL 4823761, at \*5 (N.D. Tex. Sept. 12, 2007); *Molnar v. 1-800-Flowers.com, Inc.*, 2008 WL 4772125, at \*7 (C.D. Cal. 2008) (“[C]ourts have held that a party’s use of a website may be sufficient to give rise to an inference of assent to the terms of use.”). *But see Hines*, 668 F. Supp. 2d at 368 (holding that a forum-selection clause contained in browsewrap terms of use available through a link at the bottom of a website was not enforceable because it was not “reasonably communicated” to customer). *See generally* John M. Norwood, *A Summary of Statutory and Case Law Associated With Contracting in the Electronic Universe*, 4 DEPAUL BUS. & COMM. L.J. 415, 439–49 (2006) (surveying leading clickwrap TOU caselaw).

108. *Sw. Airlines Co.*, 2007 WL 4823761 at \*4 (citation omitted).

109. *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. of Cal. 2000) (stating that this was the first court to enforce a browsewrap license agreement).

110. Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 990 (2008).

111. *Sw. Airlines Co.*, 2007 WL 4823761, at \*4.

112. Mann & Siebeneicher, *supra* note 110, at 989–95.

113. *Id.* at 998.

Limitation of Damages (Caps)	108	22%
Arbitration	44	9%
Class Action Waiver	33	7%
Contractual Statute of Limitations	28	6%
Jury Trial Waiver	6	1% <sup>114</sup>

The first court to rule upon the enforceability of a browsewrap was in *Pollstar*.<sup>115</sup> The *Pollstar* court acknowledged that it was reluctant to refuse enforcement of browsewraps given other courts' willingness to enforce "pay now, terms later" in shrinkwrap agreements.<sup>116</sup>

Courts generally will not enforce a browsewrap absent evidence that a user has seen a website's terms of use to infer that they manifested assent to a browsewrap.<sup>117</sup> Nevertheless, the court in *Hubbert v. Dell Corp.* ruled that the mere posting of browsewrap terms was enough to bind the consumer.<sup>118</sup> Consumers purchasing Dell computers were bound by the terms and conditions of sales posted on Dell's Website, even though they were in no way asked to respond to terms presented only after they clicked on a hyperlink.<sup>119</sup> Courts are often indisposed to enforce browsewraps if the content creator's terms of use are inconspicuously posted.

In *DeFontes v. Dell Computers Corp.*,<sup>120</sup> the court declined to uphold Dell Computers' Terms and Conditions Agreement accompanying a shipment of personal computers. Courts are distrustful of browsewraps if a software publisher posts terms inconspicuously or adds new terms in a rolling contract without notice.<sup>121</sup> TOUs for social media sites and their

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114. *Id.* at 999.

115. *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 974 (E.D. of Cal. 2000).

116. *Id.*

The court hesitates to declare the invalidity and unenforceability of the browse wrap license agreement at this time. Taking into consideration the examples provided by the Seventh Circuit—showing that people sometimes enter into a contract by using a service without first seeing the terms—the browser wrap license agreement may be arguably valid and enforceable.

*Id.* at 981.

117. *Id.* at 981 (ruling that fact issues remained as to whether website's browsewrap license was sufficiently conspicuous).

118. *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 121–22 (Ill. App. Ct. 2005).

119. Dell's current software license agreement and terms of use disclaim all warranties and substitute a limited remedy for UCC Article 2 remedies. *Dell Terms of Sale, License Agreements & Policies*, <http://www.dell.com/content/topics/global.aspx/policy/en/policy?c=us&l=en&s=gen&~section=015> (last updated Oct. 18, 2011).

120. *DeFontes v. Dell Computers Corp.*, No. C.A. PC 03-2636, 2004 WL 253560, at \*6 (R.I. Super. Ct., Jan. 29, 2004).

121. *See, e.g., Sw. Airlines Co. v. BoardFirst, L.L.C.*, 2007 WL 4823761, at \*5 (N.D. Tex. Sept. 12, 2007) ("[T]he validity of a browsewrap license turns on whether a website



users are analogous to the asymmetrical relationship of flies with flypaper.<sup>122</sup> The archetypical twenty-first century flypaper contract is the terms of service agreement employed widely for mass-market licenses, online websites, and networking websites.<sup>123</sup>

Nevertheless, Ronald Mann and Travis Siebeneicher question the conjecture that browsewraps used by internet retailers are anti-consumer based upon their empirical study of TOUs for 439 of the 500 largest internet retailers.<sup>124</sup> They conclude that as a rule online retailers used browsewrap agreements as opposed to other quickwraps such as clickstreams or installwraps.<sup>125</sup> Their survey concluded: “fewer than ten percent of these retailers have sales processes that create enforceable contracts on their sites and that relatively few of the contracts include terms thought to be detrimental to consumers.”<sup>126</sup>

The Reporter for the American Law Institute’s Principles of the Law of Contracts completed an empirical study that concluded that fifty-three out of fifty-four internet websites eliminated all warranty protection.<sup>127</sup> Consumer challenges to browsewraps have largely been unsuccessful even when the consumer neither read the terms nor assented to them.<sup>128</sup> A Florida court, for example, upheld Sprint’s browsewrap agreement with a pre-dispute mandatory arbitration clause in *Briceño v. Sprint Spectrum*.<sup>129</sup> The *Briceño* court reasoned that the customer had fair notice of changes to the service agreement in a bill stuffer, which stated that the terms and conditions of Sprint’s telephone service had changed. The plaintiff entered

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user has actual or constructive knowledge of a site’s terms and conditions prior to using the site.”).

122. All social networking sites are contracts of adhesion without the possibility of negotiation or individuated terms. See generally *supra* note 63 and accompanying text, at 143 (describing the formation of a contract of adhesion as “one not of haggle or cooperative process but rather of a fly and flypaper”) (footnote omitted).

123.

Standard form contracts probably account for more than ninety-nine percent of all the contracts now made. Most persons have difficulty remembering the last time they contracted other than by standard form; except for casual oral agreements, they probably never have. But if they are active, they contract by standard form several times a day. Parking lot and theater tickets, package receipts, department store charge slips, and gas station credit card purchase slips are all standard form contracts.

Slawson, *supra* note 53, at 529.

124. Mann & Siebeneicher, *supra* note 110, at 989–95.

125. *Id.* at 998.

126. *Id.* at 987 (footnote omitted).

127. Robert A. Hillman & Ibrahim Barakat, *Warranties and Disclaimers in the Electronic Age*, 11 YALE J. L. & TECH. 1, 3 (2009).

128. See, e.g., *Chandler v. AT&T Wireless Servs., Inc.*, 358 F. Supp. 2d 701, 706 (S.D. Ill. 2005) (ordering arbitration in a case where a pre-dispute arbitration clause was added to the consumer’s contract for wireless services).

129. 911 So. 2d 176, 180–81 (Fla. Dist. Ct. App. 2005).

into a contract with Sprint for telephone services in 2000.<sup>130</sup> Three years later, Sprint customers received a mailed invoice for these services and a notice to visit the Sprint website to view new terms of use.<sup>131</sup>

Sprint also gave customers the option of receiving these new terms via a cell phone message.<sup>132</sup> Subsequently, the plaintiff brought her phone to a Sprint store for repair.<sup>133</sup> Sprint employees surreptitiously obtained the password to her email, accessed personal pictures of her, and distributed them to many others.<sup>134</sup> The consumer filed suit against Sprint for the invasion of privacy and the interception of electronic communications for its employees' outrageous conduct.<sup>135</sup> The Florida court dismissed the plaintiff's lawsuit, holding that a mandatory arbitration clause governed the dispute, included in the bill stuffer.<sup>136</sup> The appellate court affirmed, giving "short shrift" to the consumer's argument that the mandatory arbitration clause was unconscionable.<sup>137</sup> The court did acknowledge that it might have come to a different conclusion if Sprint had added a monetary penalty for early termination.<sup>138</sup> Nevertheless, the court did not find Sprint's addition of the mandatory arbitration clause troublesome. Courts have upheld browsewrap terms where a computer robot repeatedly accessed the plaintiff's database."<sup>139</sup> The path of browsewrap law in the second decade of the twenty-first century demonstrates its favorable treatment in the courts.

#### 4. Social Media Terms of Use

*The Social Network*, a 2010 Hollywood blockbuster nominated for

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130. *Id.* at 177.

131. *Id.* at 177–78.

132. *Id.* at 180.

133. *Id.* at 177.

134. *Id.* at 178.

135. *Id.*

136. *Id.* at 179.

137. *Id.* at 181.

138. *Id.* at 180.

The only troubling fact is the uncertainty regarding whether or not Sprint would have enforced its early termination penalty clause in the event that Briceno had sought termination upon disagreeing with a proposed amendment to the Terms and Conditions. However, there is no evidence that Sprint charged any other customers a termination penalty for cancellation of a contract due to their refusal to accept amendments to its Terms and Conditions. We note that enforcement of an early termination fee, coupled with more onerous terms or amendments, could render an amendment unconscionable and, thus, unenforceable.

*Id.*

139. *See, e.g.,* Cairo v. Crossmedia Servs., Inc., No. C 04-04825 JW, 2005 WL 756610, at \*5 (N.D. Cal. Apr. 1, 2005) (enforcing forum selection clause in terms of use).

eight Oscars, was the compelling story of the founding of Facebook by Mark Zuckerberg, then a Harvard University undergraduate, and the ensuing lawsuit that occurred with fellow classmates over the ownership and control of what would soon become the most popular social media network in world history.<sup>140</sup> At age twenty-seven, Zuckerberg has an estimated net worth of \$17.5 billion as of March 2012.<sup>141</sup> Facebook,<sup>142</sup> Habbo,<sup>143</sup> Twitter,<sup>144</sup> YouTube,<sup>145</sup> Flickr,<sup>146</sup> Second Life,<sup>147</sup> and hundreds of other Web 2.0 sites are enrolling hundreds of millions of new users.<sup>148</sup> In February of 2012, Facebook reported 750 million users followed by Twitter with 250 million and LinkedIn with 110 million.<sup>149</sup> By way of example, Google+ launched in June 2011 and only a month later had more than twenty million users.<sup>150</sup>

Social networking sites use TOU agreements, which are presented to end-users on a “take it or leave it” basis without any possibility of negotiation.<sup>151</sup> Nearly every social media site makes user access

140. Facebook, Inc. v. Pac. Nw. Software, Inc., 640 F.3d 1034, 1042 (9th Cir. 2011) (affirming lower court’s enforcement of settlement agreement between founder of Facebook and plaintiffs charging him with misappropriation); *see also* THE SOCIAL NETWORK (Columbia Pictures 2010) (describing, with some factual embellishment, the origins of Facebook).

141. Mark Zuckerberg, FORBES WORLD’S MOST POWERFUL PEOPLE, <http://www.forbes.com/profile/mark-zuckerberg/> (last visited June 4, 2012).

142. FACEBOOK, <http://www.facebook.com/> (last visited June 4, 2012).

143. HABBO, <http://help.habbo.com/home> (last visited June 4, 2012).

144. TWITTER, <http://twitter.com/> (last visited June 4, 2012).

145. YOUTUBE, <http://www.youtube.com/> (last visited June 4, 2012).

146. FLICKR, <http://www.flickr.com/> (last visited June 4, 2012).

147. SECOND LIFE, <http://secondlife.com/> (last visited June 4, 2012).

148. *Top 15 Most Popular Social Networking Sites: June 2012*, EBIZ/MBA, <http://www.ebizmba.com/articles/social-networking-websites> (last visited June 4, 2012). Facebook alone reported 700 million users worldwide by mid-2011. Eric Eldon, *Facebook Sees Big Traffic Drops in US and Canada as It Nears 700 Million Users Worldwide*, INSIDEFACEBOOK, <http://www.insidefacebook.com/2011/06/12/facebook-sees-big-traffic-drops-in-us-and-canada-as-it-nears-700-million-users-worldwide/> (last updated June 15, 2011).

149. *Id.*

150. Dan Gillmor, *Google+: The Tweet Smell of Success*, GUARDIAN UNLIMITED (July 28, 2011, 2:30 PM), <http://www.guardian.co.uk/commentisfree/cifamerica/2011/jul/28/google-privacy-facebook>.

151.

Use of the Products and Services is subject to compliance with these Terms and Conditions. You shall be authorized to use the Products and Services for personal or commercial use. You acknowledge and agree that Virb LLC may terminate your access to the Virb or to any of the Products and Services should you fail to comply with the Terms and Conditions or any other guidelines and rules published by Virb LLC.

*General Terms and Conditions of Use*, VIRB, <http://virb.com/terms> (last updated Aug. 1, 2010); *see also* *Additional Terms of Service for Orkut*, GOOGLE (Mar. 1, 2012),

conditional upon acceptance of a TOU agreement that may take the form of a clickwrap, browsewrap, or a combination of these mass-market standard form documents.<sup>152</sup> Social networking sites receive a benefit each time a user registers and agrees to TOUs since advertising revenue is based upon their number of users.<sup>153</sup> Social networks will sometimes assert contractual formation for merely using the site, whereas others require a manifestation of assent such as clicking an agreement to registration terms.

Social media site TOUs purport to bind users to a contract that establishes terms and conditions for using content, making online purchases, or waiving rights to user-generated content.<sup>154</sup> The social network site purports to enter into transactions with millions of users who enter into a contract with functionally the same terms.<sup>155</sup> Social network

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<http://www.orkut.com/html/en-US/additionalterms.orkut.html>; *Terms and Conditions of Use*, ANOBII, [http://www.anobii.com/terms\\_of\\_service](http://www.anobii.com/terms_of_service) (last updated Jan. 26, 2011); *Terms of Service*, HI5 (Feb. 29, 2012), [http://hi5.com/terms\\_of\\_service.html](http://hi5.com/terms_of_service.html). For example:

Adobe, Inc., a leading software development and publishing company, claimed that all of its software products are subject to a shrinkwrap end user license agreement (EULA) that prohibits copying or commercial redistribution. Adobe makes educational versions of its software packages available for license to students and educators at a discount; Adobe's distributors are licensed to transfer educational versions only to resellers who have signed Off or On Campus Educational Reseller Agreements (OCRAs) with Adobe.

Kurtis A. Kemper, *Resale and Use of Licensed Technology*, 2 COMPUTER & INFO. L. DIGEST § 7:20 (2d ed. 2010) (updated October, 2011).

152. See *supra* note 7 and accompanying text.

153. One company estimated in February 2011 that worldwide advertising spending on social networks will grow from \$2.4 billion in 2009 to \$8.1 billion in 2012. Bazaarvoice, Inc., Registration Statement (Form S-1/A) 3 (Oct. 7, 2011) (estimating significant growth in advertising spending on social networks in an SEC registration statement). Additionally, as one law student noted:

[A user has] actually paid for these convenient services with the private information that she provided the service providers by, among other things, posting personal information on [sic] their "private" profile. Search engines and social networking services mine the information that users "give" in exchange for services, and then sell it to external developers or marketers.

Jared S. Livingston, Comment, *Invasion Contracts: The Privacy Implications of Terms of Use Agreements in the Online Social Media Setting*, 21 ALB. L.J. SCI. & TECH. 591, 593 (2011) (footnote omitted).

154. A TOU may be deployed for all sorts of purposes. It may set the terms and conditions for online purchases; it may limit the site's liability for damage that its content and services cause to users. A site may, through its TOU, obtain the rights to use and reproduce content users post to a website, for example, comments to a blog. In addition, TOUs may condition or restrict the subsequent uses a site visitor may make of content that he or she access on the website.

155. See, e.g., *Match.com Terms of Use Agreement*, MATCH.COM, <http://www.match.com/registration/membagr.aspx> (last updated Apr. 9, 2012); *Statements of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/terms.php?ref=pf> (last updated April 26, 2011); *Terms of Service*, YOUTUBE (June 9, 2010),

websites typically employ a browsewrap form that purports to bind the users if they merely access the website.<sup>156</sup> Some social networking sites require users to manifest assent by completing registration.<sup>157</sup> Other social networking sites require users to enter into clickwrap agreements.<sup>158</sup> Social media websites protect and gain rights in user-generated intellectual property by relying on their TOUs, confidentiality procedures, and contractual provisions, as well as international, national, state, and common law rights. Consumers around the world are waving goodbye to rights and remedies for user-generated content or control over their personal information and content including resale of their information.<sup>159</sup>

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<http://www.youtube.com/t/terms>; *Terms of Service*, EHARMONY, <http://www.eharmony.com/about/terms> (last updated Apr. 24, 2012); *Terms of Use Agreement*, ZOOSK, <https://www.zoosk.com/tos.php?from=footer> (last updated Aug. 11, 2011); *Yahoo! Terms of Service*, YAHOO!, <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> (last updated Nov. 24, 2008).

156. Bebo, for example, uses the browsewrap and does not require users to manifest assent after an opportunity to read terms. Bebo's browsewrap states: "[b]y accessing or using the Bebo Service, you signify that you have read the following terms and conditions (the 'Terms of Service') and accept and agree to be bound by them, whether or not you register with Bebo." BEBO, <http://www.bebo.com/TermsOfUse2.jsp> (last updated Apr. 19, 2011); *see also Terms of Use*, CARINGBRIDGE, (Mar. 28, 2012), <http://www.Caringbridge.org/termsofuse> ("By using this Service, you are bound by these Terms of Use.").

157. For example, the Terms of Service on the Tagged website includes the following language:

By completing the registration process for the Tagged website, you represent that you are 13 years of age or older, and can and will be legally bound by this Agreement. If you are a minor, your parent or guardian must read and accept the terms of this Agreement before you register.

*Terms of Service*, TAGGED, [http://www.tagged.com/terms\\_of\\_service.html](http://www.tagged.com/terms_of_service.html) (last updated Sept. 30, 2011).

158. LinkedIn advises those who do not agree with the User Agreement not to access the website or to click "join now." *User Agreement*, LINKEDIN, [http://www.linkedin.com/static?key=user\\_agreement](http://www.linkedin.com/static?key=user_agreement) (last updated on June 16, 2011).

By clicking "Join Now," you acknowledge that you have read and understood the terms and conditions of this Agreement and that you agree to be bound by all of its provisions. By clicking "Join Now," you also consent to use electronic signatures and acknowledge your click of the "Join Now" button as one. Please note that the LinkedIn User Agreement and Privacy Policy are also collectively referred to as LinkedIn's "Terms of Service."

*Id.*

159. *See* Abruzzi, *supra* note 49, at 86:

Sites condition access to their content on visitors' acceptance of these TOU, which generally assume an agreement between the website and user that is enforceable by state contract law. TOU may be deployed to all sorts of purposes. They may set the terms and conditions for online purchases; they may limit the site's liability for damage that its content and services cause to users. A site may, through its TOU, obtain the rights to use and reproduce content users post to a website, for example,

Facebook requires all users to submit to its TOU agreement as a condition of using its platform.<sup>160</sup> Social media sites do not negotiate any TOU terms with their users, as content is presented on a “take it or leave it” basis. Users are explicitly instructed that their only remedy is to leave the social networking site if they disagree with the terms of service.<sup>161</sup> This standard term provides that a social network site may terminate the user’s account at any time without cause, penalty, or explanation.<sup>162</sup> Additionally, many social networking sites list prohibited activities on the platform.<sup>163</sup>

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comments to a blog. And TOU may condition or restrict the subsequent uses a site visitor may make of content that he or she access[es] on the website.

160. *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/terms.php?ref=pf>, (last updated Apr. 26, 2011).

161. By way of example, Tagged makes it clear that a Member’s only recourse is to stop using the service: “Should Member object to any terms and conditions of the Agreement or any subsequent modifications thereto or become dissatisfied with Tagged in any way, Member’s only recourse is to immediately: (1) discontinue use of Tagged; (2) terminate Tagged registration; and (3) notify Tagged of termination.” *Terms of Service*, TAGGED, [http://www.tagged.com/terms\\_of\\_service.html](http://www.tagged.com/terms_of_service.html) (last updated Sept. 30, 2011); *see also Terms of Service*, XANGA (June 7, 2011) <http://help.xanga.com/about/legal/terms-of-use/> (“If you do not agree to any modification, you should stop using Xanga immediately. You should return to this page on a regular basis to view any modification to the Terms of Use.”). Also, Last.fm’s TOU advises users that disagree with terms to leave the site with the following: “IF YOU DO NOT AGREE TO BE BOUND BY ALL OF THESE TERMS OF USE, DO NOT USE THE PROPERTIES.” *Terms of Use*, LAST.FM, <http://www.last.fm/legal/terms> (last updated Dec. 15, 2011).

162. Bebo reserves the right to terminate an account for any reason. Bebo’s termination clause provides:

Bebo may also, in its sole discretion and at any time, discontinue temporarily or permanently providing the Bebo Service, or any part thereof, with or without notice. You agree that any termination of access to the Bebo Service under any provision of the Terms of Service may be effected without notice, and acknowledge and agree that Bebo may immediately deactivate or delete your account and all related information and files in your account and/or bar any further access to such files or the Bebo Service. Where possible, Bebo will use reasonable efforts to give Members fair notice of termination or suspension of their access to the Bebo Service. Further you agree that Bebo shall not be liable to you or any third party for any termination or suspension of access to the Bebo Service or modification of the Bebo Service.

*Terms of Use*, BEBO, <http://www.bebo.com/TermsOfUse2.jsp> (last updated Apr. 19, 2011). Facebook’s termination provisions are based upon violation of the terms of use:

If you violate the letter or spirit of this Statement, or otherwise create risk or possible legal exposure for us, we can stop providing all or part of Facebook to you. We will notify you by email or at the next time you attempt to access your account. You may also delete your account or disable your application at any time. In all such cases, this Statement shall terminate, but the following provisions will still apply . . . .

*Statement of Rights and Responsibilities*, ¶ 14 *Termination*, FACEBOOK, <http://www.facebook.com/terms.php?ref=pf> (last updated Apr. 26, 2011).

163. Tagged prohibits twenty-two activities. Members, for example, may “not engage in any activity that constitutes harassment, including, but not limited to, excessive repetition when listing a person as a referral, repeated unwanted contact, interfering with a Member’s

To paraphrase Judge Frank Easterbrook, TOUs for social networking sites are mutating “faster than the virus in *The Andromeda Strain*.”<sup>164</sup> In contrast to the older TOU methods such as shrinkwrap, clickwrap, and browsewrap, there is little by way of case law discussing the enforceability of social media terms of use.<sup>165</sup> Social networking sites often require users to give the website a perpetual license<sup>166</sup> to distribute user-generated content.<sup>167</sup> Social networking TOUs will typically specify the conditions in which the user-generated content may be used and the end-user registrant must accept such conditions prior to access to the site’s user-generated content.<sup>168</sup>

TOUs typically require consumers to hold social networking sites harmless and indemnify them, as well as paying their reasonable legal fees if a lawsuit is brought against the social media site because of illegal or objectionable content.<sup>169</sup> Foreign users of Facebook “consent to having

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use of site or stalking.” *Terms of Service*, TAGGED, [http://www.tagged.com/terms\\_of\\_service.html](http://www.tagged.com/terms_of_service.html) (last updated Sept. 30, 2011) (prohibiting Members from “list[ing] the email addresses of people unknown to them”).

164. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (describing rapid evolution of the World Wide Web).

165. The secondary literature on social networking sites tends to focus on problems such as the privacy of users rather than the enforceability of the TOU. See, e.g., Livingston, *supra* note 153, at 591 (explaining the absence of policy terms that can protect social media users’ information).

166. At least one court has invalidated perpetual licenses based upon the same public policy found in the rule against perpetuities. See *McAllister Software Sys., Inc. v. Henry Schein, Inc.*, No. 1:06CV00093 RWS, 2008 WL 922328, at \*4–5 (E.D. Mo. 2008).

167. Orkut’s Additional Terms of Use requires users to give the social network a license to distribute content. Orkut requires users to agree to grant licenses to Google “to use your content or Items (collectively ‘Content’) to provide the services [which] terminate within a commercially reasonable time after you remove the Content from Orkut or delete your Orkut account.” *Additional Terms of Service for Orkut*, GOOGLE (Mar. 1, 2012) <http://www.orkut.com/html/en-US/additionalterms.orkut.html>.

168. Common terms address user submissions, prohibited content (pornography, IP rights, rights of publicity, commercial content or endorsements, promotions, sweepstakes, software viruses, and other malicious or illegal content), community norms, responsibility for submissions posted on the service, ownership of the site, refusal to post or removal of postings, termination of accounts, ownership of content choice of law, choice of forum, privacy policies, warranty disclaimers, limitations of liability, intellectual property infringement, notice and takedown provisions, licenses to use submissions, third party websites and services (no endorsements), provisions for modifying the agreement, integration or merger clauses and provisions for the termination and modification of the agreement. See, e.g., *Terms of Use*, CARINGBRIDGE (Mar. 28, 2012), <http://www.Caringbridge.org/termsfuse> (specifying the conditions in which user-generated content may be used).

169. For example, the User Agreement on LinkedIn includes the following language:

You indemnify us and hold us harmless for all damages, losses and costs (including, but not limited to, reasonable attorneys’ fees and costs) related to all third party claims, charges, and investigations, caused by (1) your failure to comply with this

[their] personal data transferred to and processed in the United States.”<sup>170</sup> One blog described Facebook’s revisions to their TOU agreement: “We Can Do Anything We Want With Your Content. Forever.”<sup>171</sup>

The vast majority of social networking sites employ a browsewrap-type agreement that conditions access to their services on agreement to the site’s terms of use often supplemented by a registration requirement.<sup>172</sup> The latest stage in evolution of the consumer TOU is the social media TOU, which is a hybrid between the browsewrap and the clickwrap. The typical social networking sites state that users are bound by using the site, but most also require users to agree to the terms during the registration process.<sup>173</sup>

## II. THE PRIVATE INTERNATIONAL LAW ASPECTS OF TERMS OF USE

### A. Mass-Market Terms of Use for a Global Economy

The law of consumer TOUs operates in an increasingly flattened global economy. The ubiquity of one-sided TOUs for the U.S. consumer market is undisputed; however, these agreements are not enforceable in Europe. Software and other content are being exported around the world. Microsoft Corporation now owns “a ninety-two percent share of the world’s operating system market.”<sup>174</sup> Facebook,<sup>175</sup> Habbo,<sup>176</sup> Twitter,<sup>177</sup>

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Agreement, including, without limitation, your submission of content that violates third party rights or applicable laws, (2) any content you submit to the Services, and (3) any activity in which you engage on or through LinkedIn.

*User Agreement*, LINKEDIN, [http://www.linkedin.com/static?key=user\\_agreement](http://www.linkedin.com/static?key=user_agreement) (last updated June 16, 2011)

170. *Id.*

171. Daniel Nemet-Nejat, *Hey, That’s My Persona!: Exploring the Right of Publicity for Blogs and Online Social Networks*, 33 COLUM. J.L. & ARTS 113, 129 (2009).

172. Some sites are a hybrid between a browsewrap and a clickwrap because they predicate the manifestation of assent upon either browsing a site or clicking agreement to the terms in a registration process. See, e.g., *User Agreement*, LINKEDIN, [http://www.linkedin.com/static?key=user\\_agreement](http://www.linkedin.com/static?key=user_agreement) (last updated June 16, 2011) (providing an example of a hybrid user agreement).

173. *Terms of Use*, DONTSTAYIN, <http://www.dontstayin.com/pages/legaltermsuser/> (last updated June 14, 2011).

These Terms & Conditions (‘the Terms’) apply to all users of the DontStayIn website (‘the Site’) and by using the Site, you agree to be bound by them. If you do not agree to be bound by these Terms, please stop using the Site immediately. You are also asked to expressly agree to these Terms at various parts of the website including, for example, on registration.

*Id.*

174. Peter Thomas Luce, *Hiding Behind Borders in a Borderless World: Extraterritorial Doctrine and the Inadequacy of U.S. Patent Protection in a Networked Economy*, 10 TUL. J. TECH. & INTELL. PROP. 259, 260 (2007) (footnote omitted).



YouTube,<sup>178</sup> Flickr,<sup>179</sup> Second Life,<sup>180</sup> and numerous other social media websites count hundreds of millions of users worldwide. To understand the scope of such sites, consider the global nature of the internet as a communication medium. Recall the classic television advertisement where a mechanic with a huge mallet and a two by four were trying to fit the wrong size battery into a car.<sup>181</sup> European courts and consumer agencies are not comfortable with trying to accommodate U.S.-style terms of service agreements because many terms clash with mandatory consumer protection rules. European courts and consumer agencies will not be comfortable with the “make it fit” mentality either. Facebook, as a point of reference, reported 901 million subscribers around the world by March 2012.<sup>182</sup> Facebook has a substantial impact on the Eurozone:

- Facebook adds an estimated €15.3 billion value to the European economy
- Facebook helps to support 232,000 jobs across Europe
- Increased businesses participation through advertising, customer referrals and enhanced brand value is worth around €7.3bn
- The Facebook App Economy is worth €1.9bn and supports around 29,000 jobs.<sup>183</sup>

The seamy side of Facebook’s success in Europe is that its privacy policies are increasingly scrutinized by European authorities. The Consumer Council of Norway concluded that social networking sites such as Facebook deprive users of rights under the Data Protection Directive, which is law in the twenty-seven countries of the European Union.<sup>184</sup>

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175. FACEBOOK, <http://www.facebook.com/> (last visited June 4, 2012).

176. HABBO, <http://help.habbo.com/home> (last visited June 4, 2012).

177. TWITTER, <http://twitter.com/> (last visited June 4, 2012).

178. YOUTUBE, <http://www.youtube.com/> (last visited June 4, 2012).

179. FLICKR, <http://www.flickr.com/> (last visited June 4 2012).

180. SECOND LIFE, <http://secondlife.com/> (last visited June 4, 2012).

181. The classic television advertisement was used to describe the attempt of U.S. courts to make a UCC article fit the commercial realities of software licensing:

The courts’ strained efforts of applying the law of sales to the licensing of intangibles is like the television commercial in which two mechanics are trying to fit an oversized automobile battery into a car too small to accommodate it. The car owner looks on with horror as the mechanics hit the battery with mallets, trying to drive it into place. The owner objects and the mechanics say, “we’ll make it fit!” The owner says, “I’m not comfortable with make it fit.”

*Commercial Law Infrastructure for the Age of Information*, *supra* note 16, at 270.

182. See *supra* note 3 and accompanying text.

183. *Measuring Facebook’s Economic Impact in Europe*, FACEBOOK (Jan. 24, 2012), <http://newsroom.fb.com/Whats-New-Home-Page/Measuring-Facebook-s-economic-impact-in-Europe-ae.aspx>.

184. Øyvind Herseth Kaldestad, *Facebook and Zynga Reported to the Data Inspectorate*,

In the roughly forty years since IBM's unbundling decision, the software industry has evolved into America's third largest industry, accounting for an ever-increasing share of the export market.<sup>185</sup> In the period between 1994 and 1996, revenues for Microsoft increased from \$1.36 billion to \$2.02 billion.<sup>186</sup> The U.S. share of "the packaged software market was \$136.6 billion or 45.9% of the world market" in 2008.<sup>187</sup> The worldwide PC software market was \$88 billion for that same year, a figure that includes "business and consumer applications (e.g., Intuit Quicken, Rosetta Stone, Corel WordPerfect or Quark QuarkXPress)."<sup>188</sup> Global sales of personal computers are predicted to grow 10.5% this year to 388 million units.<sup>189</sup> Social networks, too, cross national borders. For example, Italy ranks first in "social network time per person just under six and a half hours per month (6:27:53), and Australia is a close second (6:02:34)," with the United States ranked third in social networking usage.<sup>190</sup>

As a specific case study, SPSS, Inc. reported that its cross-border licensing activities were skyrocketing as revenues from these activities comprised fifty-nine percent of its total revenues.<sup>191</sup> This software company acknowledged that "the burdens of complying with a wide variety of foreign laws and regulatory requirements" might affect its future revenues.<sup>192</sup> The U.S. accounts for nearly two out of every three personal computer units worldwide and approximately sixty percent of global spending on IT goes to U.S. companies.<sup>193</sup> Fifty percent of revenues for publicly traded software companies now are derived from the overseas

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FORBRUKERRÅDET, [http://forbrukerportalen.no/Artikler/2010/Facebook\\_and\\_Zynga\\_reported\\_to\\_the\\_Data\\_Inspectorate](http://forbrukerportalen.no/Artikler/2010/Facebook_and_Zynga_reported_to_the_Data_Inspectorate) (last updated Jan. 7, 2011, 1:31 PM) (arguing that Facebook and an online gaming company result in users renouncing privacy rights guaranteed by the Data Protection Directive).

185. Garon, *supra* note 11, at 574 (stating by 1996 computer software was ranked as the "third largest segment of the U.S. economy, behind only the automotive industry and electronic manufacturing" and "projected to grow five times faster than the economy as a whole") (quoting *One Million New Positions Seen by 2006—Software Sets Pace for Future Job Growth*, *supra* note 11, at 1–2)).

186. Microsoft Corporation, Annual Report 1996: Management's Discussion and Analysis, available at <http://www.microsoft.com/investor/reports/ar96/financials/md.htm> (last visited June 4, 2012).

187. BUSINESS SOFTWARE ALLIANCE, SOFTWARE INDUSTRY: FACTS AND FIGURES 2 (citing IDC study).

188. *Id.* (quoting IDC study).

189. *Dell and Hewlett-Packard: Rebooting Their Systems*, THE ECONOMIST, Mar. 10, 2011, at 73.

190. Jennifer Van Grove, *Social Network Usage Surges Globally*, MASHABLE (Mar. 19, 2010), <http://mashable.com/2010/03/19/global-social-media-usage/>.

191. SPSS, Inc., Annual Report (Form 10-K) (Feb. 18, 2009).

192. *Id.*

193. BUSINESS SOFTWARE ALLIANCE, *supra* note 187.

market.<sup>194</sup> U.S. companies exporting software and digital data will need to comply with procedural and substantive consumer protection in the target countries.

*B. The General Theory of European Private International Law*

Private international law, as opposed to public international law, “determines the applicability of the legal systems and the jurisdiction . . . of different States in private legal relations.”<sup>195</sup> The classic definition of private international law was that it set the ground rules for whether local courts should recognize foreign judgments. “Rules of private international law may conveniently be referred to as conflict rules” governing three procedural problems: cross-border jurisdiction, choice of law between foreign states, and the enforcement of foreign judgments.<sup>196</sup> In a global economy, software companies need to know whether a judgment rendered in one country will be enforced in another country. Europe has enacted regional rules governing cross-border jurisdictional questions in the EU’s principal legislation on jurisdiction.<sup>197</sup> In the United States, personal jurisdiction can be either general or specific depending upon the nature of the contacts that the defendant has with the forum state.<sup>198</sup> In Europe, “private international law” is the body of law that resolves jurisdiction, choice of law, and conflict of law issues.<sup>199</sup> Social networking sites also frequently violate the Rome I Regulation choice of law provisions, which

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194. *Id.*

195. LUDWIG VON BAR, *THE THEORY AND PRACTICE OF PRIVATE INTERNATIONAL LAW* 1 (2d ed. 1892).

196. PETER STONE, *EU PRIVATE INTERNATIONAL LAW* 3 (2d ed. 2010).

197.

[T]he European Union has multiple instruments governing certain aspects of extraterritorial jurisdiction, including the Brussels Convention, the Lugano Convention, and the Brussels Regulation. It has also adopted directives in a number of areas, such as insolvency, growing out of its treaties. It is not clear, however, that these regional rules influence the principles applicable under international law more generally.

INT’L BAR ASS’N, *REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION* 17 (2009) (comparing legislative jurisdiction, or the power of legislatures to make laws governing particular peoples and circumstances, to adjudicatory jurisdiction).

198. *Conti v. Pneumatic Prods. Corp.*, 977 F.2d 978, 981 (6th Cir. 1992) (noting that a distinction between general and specific jurisdiction exists for the purpose of the due process analysis). General jurisdiction is proper only where “a defendant’s contacts with the forum state are of such a ‘continuous and systematic nature’ that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant’s contacts with the state.” *Third Nat’l Bank v. WEDGE Group, Inc.*, 882 F.2d 1087, 1089 (6th Cir. 1989) (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)).

199. STONE, *supra* note 196, at 3.

have an extraterritorial application.<sup>200</sup>

Europe's creation of harmonized private international law (PIL) is rooted in its unique formation of the twenty-seven members of the EU.<sup>201</sup> The principal EU legislations addressing PIL are the Brussels Regulation, which governs jurisdiction and the enforcement of judgment, and the Rome Regulation, which displaces the 1980 Rome Convention on the law applicable to contractual obligations.<sup>202</sup> Europe's harmonized private international law applies as the EU continues to enact new legislation.<sup>203</sup> Europe's interest in harmonized PIL was prefigured by the Treaty of the European Community, which sought to create economic cooperation by eliminating obstructions to trade caused by divergence in the law.<sup>204</sup> "European governance" refers to the methods by which powers are exercised at the EU level embodying principles of "openness, participation, accountability, effectiveness and coherence."<sup>205</sup> The EU formed new legal institutions to carry out its objective of transcending national borders.<sup>206</sup> The twenty-seven Member States are represented as the Council of European Union, which drafts the legislation of Europe for its 495 million citizens. The EU seeks to develop equal enforcement of consumer

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200. Choice of law principles are employed by courts to determine which law applies when parties do not use a choice of law clause.

201. STONE, *supra* note 196, at vi (noting that the Eurozone's PIL has expanded with the approval of a revised Lugano Convention on jurisdiction and judgment for the EFTA countries such as Norway).

202. *Id.*

203. The European Union is a Member State of the Hague Convention on Private International Law. *Id.*

204.

Signed in 1957 by the heads of government of France, Belgium, Luxembourg, West Germany, the Netherlands and Italy, the treaty was the result of eleven years of attempts to reconstruct the European continent after World War II. The European Coal and Steel Community (ECSC) laid the ground for the EEC by opening the markets for those products between several countries in continental Europe. The Treaty of Rome adopted many of the institutional structures of the ECSC but set out to have far greater reach. It tried to combine federalist and intergovernmental ideas. The idea of a United States of Europe had been posed by Sir Winston Churchill in 1946 and was driven forward by Jean Monnet during the 1950s.

*EU Facts: Treaty of Rome*, CIVITAS, <http://www.civitas.org.uk/eufacts/FSTREAT/TR1.htm> (last updated July 27, 2011).

205. Eur. Comm'n, *European Governance: A White Paper*, July 25, 2001, at 8 n.1, available at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001\\_0428en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf).

206.

The EU's robust competition policy dates from the Treaty of Rome. It is the vital corollary to the rules on free trade within the European single market. This policy is implemented by the European Commission which, together with the Court of Justice, is responsible for ensuring that it is respected.

*The EU at a Glance: The Single Market*, EUROPA, [http://europa.eu/abc/12lessons/lesson\\_6/index\\_en.htm](http://europa.eu/abc/12lessons/lesson_6/index_en.htm) (last visited June 5, 2012).

protection throughout the EU for its “495 million inhabitants—the world’s third largest population after China and India.”<sup>207</sup>

In 1993, the European Single Market was completed, embodying “the ‘four freedoms’—the free movement of people, goods, services and capital.”<sup>208</sup> The 1990s was the decade of two EU-wide treaties, “the ‘Maastricht’ Treaty on European Union in 1993 and the Treaty of Amsterdam in 1999.”<sup>209</sup> The EU has enacted mandatory substantive contract rules that set a “body of law support[ing] contract formation by setting clear standards for the drafters, while at the same time better protecting consumer interests.”<sup>210</sup> The European Commission is charged with developing a single legal framework to advance free competition and trade to advance a single market. The European Commission’s task is herculean because it must develop common principles for a culturally diverse block of twenty-seven EU Member States that follow radically different civil and common law traditions.<sup>211</sup> The Commission has powers of initiative, implementation, management, and control, allowing the formation of harmonized regulations.<sup>212</sup> The twenty-seven countries of the

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207. Eur. Comm’n, *General Policy Framework*, EUROPA, [ec.europa.eu/internal\\_market/top\\_layer/index\\_1\\_en.htm](http://ec.europa.eu/internal_market/top_layer/index_1_en.htm) (last updated Mar. 23, 2012).

208. *Id.* Moreover, “[t]he 1957 Treaty establishing the European Economic Community made it possible to abolish customs barriers within the Community and establish a common customs tariff to be applied to goods from non-EEC countries. This objective was achieved on 1 July 1968.” *The EU at a Glance: The Single Market*, *supra* note 206. However, customs duties are only one aspect of protectionist barriers to cross-border trade. In the 1970s, other trade barriers hampered the complete achievement of the common market. Technical norms, health and safety standards, national regulations on the right to practice certain professions and exchange controls all restricted the free movement of people, goods and capital.

209. *The History of the European Union*, EUROPA, [http://europa.eu/abc/history/index\\_en.htm](http://europa.eu/abc/history/index_en.htm) (last visited June 5, 2012).

210. Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1065 (2005).

211. Germany has the largest population with 82.1 million and Malta only 0.4 million. See Ruth Sefton-Green, *Multiculturalism, Europhilia, and Harmonization: Harmony or Disharmony*, UTRECHT L. REV., <http://www.utrechtlawreview.org/index.php/ulr/article/viewFile/140/136>.

212.

The European Commission is charged with developing a legal framework to advance free competition in the Single Market. The Commission has powers of initiative, implementation, management, and control, which allows it to formulate harmonized regulations. In the past decade, the Commission has approved Internet regulations such as the E-Commerce Directive, E-Signatures Directive, Distance Selling Directive, Data Protection Directive, Database Protection Directive, and the Copyright Directive. The European Union recognizes that e-commerce cannot flourish without revamping the legal infrastructure.

Michael L. Rustad & Thomas H. Koenig, *Harmonizing Cybertort Law for Europe and America*, 5 J. HIGH TECH. L. 13, 24–25 (2005).

EU have enacted a thick regime of consumer protection to overcome the barriers of integration of the European market and to promote fair and equal competition.<sup>213</sup> In the United States, courts vary in their consumer protection by jurisdiction. By contrast, in the Eurozone, there is a growing acceptance of transnational regulatory agencies regulating and developing the market.<sup>214</sup> The purpose of the EU was to create a seamless body of consumer protection, providing certainty for consumers and predictability for the business community. European consumers view free market solutions with suspicion if there is no guaranteed minimal protection under national law. The European Commission viewed consumer skepticism as one of the greatest barriers to the integration of the European market. The EU's approach is to assure consumers by providing them with the same protection in each of the twenty-seven Member States. This unified approach has enabled Europe to take the lead in formulating harmonized rules for cross-border protection of consumers in contracts and commercial transactions.<sup>215</sup>

Europe's unique ceding of sovereignty to achieve uniform rules in private international law is a model for global consumer protection.<sup>216</sup> At a minimum, U.S. software companies and social networking websites that target their services outside of the United States must comply with the mandatory consumer rules of the Eurozone. If a browsewrap or clickwrap is directed to consumers in Europe, the agreement must be localized to comply with European Union directives on unfair contract terms, jurisdiction and the enforcement of judgments, choice of law, and other mandatory rules.<sup>217</sup>

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213. Jane K. Winn & Brian H. Bix, *Diverging Perspectives on Electronic Contracting in the U.S. and EU*, 54 CLEV. ST. L. REV. 175, 184 (2006).

214. Jane K. Winn, *Contracting Spyware by Contract*, 20 BERKELEY TECH. L.J. 1345, 1361 (2005).

215. Europeans have long sought to harmonize private international law. "Similar efforts by the Dutch jurist Tobias Michael Carel Asser proved successful in 1893 with the founding of the Hague Conference on Private International Law. In 1904 Japan became the first non-European state to participate in the Hague Conference." *Hague Conference on Private International Law*, ENCYCLOPEDIA BRITANNICA ONLINE, (available by subscription at <http://www.britannica.com>).

216.

Half a century of European integration has shown that the EU as a whole is greater than the sum of its parts: it has much more economic, social, technological, commercial and political clout than if its member states had to act individually. There is added value in acting together and speaking with a single voice as the European Union.

*Why the European Union?*, EUROPA, [http://europa.eu/abc/12lessons/lesson\\_1/index\\_en.htm](http://europa.eu/abc/12lessons/lesson_1/index_en.htm) (last visited June 7, 2012).

217. See Rustad & Koenig, *supra* note 212, at 47–49 (comparing U.S. and European contract, tort, and regulations governing software and Internet-related technologies).

### 1. Brussels Regulation Home Court Advantage for Consumers

The Brussels Regulation addresses the question of which court is competent to determine a case where a licensor is domiciled in one Member State and the licensee is domiciled in another. The Brussels Regulation has nearly identical provisions to the Convention and applies to all EU Member States unless they exercise an opt-out right.<sup>218</sup> The parties' forum selection clause is an agreement where the parties to a contract agree in advance to an exclusive forum to settle any dispute arising out of a terms of service (TOS).<sup>219</sup> The EU's Brussels Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters replaced the 1968 Brussels Convention.<sup>220</sup> The Brussels Regulation, effective since March 2002, applies to all twenty-seven EU Member States.<sup>221</sup> The Brussels Regulation sets forth the general rule that "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."<sup>222</sup> Article 15 of the Brussels Regulation provides that if a business pursues commercial or professional activities in the Member State, the consumer may file suit in the court where he or she is domiciled.<sup>223</sup> Article 15(1)(c) extends the consumer home forum rule to entities that direct activities to Member States.<sup>224</sup> The far-reaching consumers provisions apply equally to software vendors

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The Brussels Regulation applies to every EU Member State except Denmark, which continues to follow the rules of the Brussels Convention. Additionally, Switzerland, Iceland, and Norway continue to apply the 1988 Lugano Convention. Similar to the Brussels and Lugano Conventions, the Brussels Regulation extends the bright line rules for jurisdiction and judgment to the new accession states, which have joined the European Union since the earlier Conventions.

Michael L. Rustad, *Circles of E-Commerce Trust: Old America v. New Europe*, 16 MICH. ST. J. INT'L L. 183, 188 (2007).

219. *Eslworldwide.com, Inc. v. Interland Inc.*, No. 06 CV 2503(LBS), 2006 WL 1716881, at \*2 (S.D.N.Y. June 21, 2006) (upholding forum selection clause in mandatory clickthrough agreement); *Salco Distributors, L.L.C. v. iCode, Inc.*, No. 8:05 CV 642 T 27TGW, 2006 WL 449156, at \*2–3 (M.D. Fla. Feb. 22, 2006) (finding that the EULA was referenced in the purchase order and that by failing to return the software within seven days, and after having the opportunity to review and accept the EULA three separate times during installation and registration of the software, plaintiff was bound by its terms, including the forum selection clause).

220. Regulations are automatically applicable to all EU member states. Conventions are the equivalent of treaties. When a new member state joins the European Union, regulations apply automatically, unlike the case with Conventions. Council Regulation (EC) No. 44/2001, 2001 O.J. (L 12) (EC) [hereinafter Brussels Regulation].

221. *Id.*

222. *Id.* at art. 2(1).

223. *Id.* at art. 15(1)(c).

224. *Id.*

targeting European consumers. In business-to-business contracts, the rules are similar to the U.S. rules in that the parties may choose to submit to jurisdiction in advance. Article 2 determines jurisdiction for both natural and legal persons based upon domicile.<sup>225</sup>

Social networking sites, and other websites, that direct their content and services to consumers in Member States are likely to be subject to the Brussels Regulation. The Schlosser Report, which is one of the two official reports on Brussels' Convention,<sup>226</sup> explains that the jurisdiction of the consumer's residence rule applies "[I]f the trader has taken steps to market his goods and services there. . . . such as advertising in the press, on the radio or television, in the cinema, or by mailing catalogues, or he must have made a business proposal individually through an intermediary or representative . . . ." <sup>227</sup> While the Schlosser Report does not address software downloads *per se*, the new Regulation applies to the contract completed on an interactive website, as confirmed explicitly by the European Commission.<sup>228</sup>

## 2. How Social Networking Sites Violate the Brussels Regulation

TOUs for social media services that compel consumers to litigate in distant forums are largely unenforceable because they violate mandatory European consumer regulations and directives. The EU has a home court rule that prevents European consumers from litigating in distant forums.<sup>229</sup> Moreover, the European Union does not permit consumers to waive their rights by acceding to one-sided choice of law clauses in TOUs.<sup>230</sup>

225. *Id.* at art. 2.

226. PETER SCHLOSSER, REPORT ON THE CONVENTION ON THE ASSOCIATION OF THE KINGDOM OF DENMARK, IRELAND AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND TO THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS AND TO THE PROTOCOL ON ITS INTERPRETATION BY THE COURT OF JUSTICE, 1979 O.J. (C 59/71) (Mar. 5, 1979).

227. Jane Kaufman Winn & Michael Rhoades Pullen, *Despatches from the Front: Recent Skirmishes along the Frontiers of Electronic Contracting Law*, in *Annual Cyberspace Law Survey*, 55 The Bus. Law. 455 (1999).

228. Moritz Keller, *Lessons for the Hague: Internet Jurisdiction in Contract and Tort Cases in the European Community and the United States*, 23 J. MARSHALL J. COMPUTER & INFO. L. 1, 58 (2004).

229. The Brussels Regulation, for example, gives consumers the right to sue suppliers in their home court. It provides that if a business "pursues commercial or professional activities in the Member State" then the consumer may sue in the court where he or she is domiciled. Rustad, *supra* note 104, at 90 (2004). See generally Brussels Regulation, *supra* note 220, at arts. 15–17.

230. Just by way of example, the Rome I Regulation imposes mandatory consumer rules on all contracting parties. Council Regulation 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations, 2008 O.J. (L



European-based social networking sites require all users, including consumers, to submit to jurisdiction in distant forums, contrary to the mandatory consumer rules of the Brussels Regulation. ASmallWorld is “the world’s leading private online community” catering to international networks.<sup>231</sup> This by-invitation-only website is chaired by Patrick Liotard-Vogt, a Swiss online entrepreneur.<sup>232</sup> ASmallWorld’s website requires consumers to:

[A]gree to submit to the personal and exclusive jurisdiction of the courts located in England, United Kingdom. If for any reason a court of competent jurisdiction finds any provision or portion of these terms and conditions to be unenforceable, the remainder of the terms and conditions will continue in full force and effect.<sup>233</sup>

Skyrock.com, a French social networking music-sharing website, requires its users to agree to submit to jurisdiction in France. Skyrock.com requires users to submit to General Terms of Use for Telefun Online Services that includes a clause conferring jurisdiction:

THE PARIS TRIBUNAL DE GRANDE INSTANCE (LARGE CLAIMS COURT) HAS EXCLUSIVE JURISDICTION OVER ALL DISPUTES BETWEEN THE PARTIES CONCERNING, IN PARTICULAR, THE FORMATION, PERFORMANCE, CONSTRUCTION AND TERMINATION OR RESCISSION OF THESE GTU AND STU, INCLUDING FOR PROTECTIVE MEASURES, URGENT PROCEEDINGS, INTERIM PROCEEDINGS, JOINDERS, EX PARTE PROCEEDINGS OR MULTIPLE RESPONDENTS.<sup>234</sup>

Don’tStayIn, a rock music and clubbing social networking site, requires its users to submit to jurisdiction as well as choice of law in the United Kingdom:

These Terms shall be governed by and construed in accordance with the laws of England. You irrevocably submit to the exclusive jurisdiction of the courts of England to settle any

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177/6) (EC). Article 1(1) explains that the “Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.” *Id.* at art. 1(1). Article 6 defines a consumer as “being outside his trade or profession . . . with another person acting in the exercise of his trade or profession . . . .” *Id.* at art. 6. Rome I adopts the consumer’s home court rule, which means that the governing law for consumers is where she has her “habitual residence.” *Id.*

231. *About ASmallWorld*, ASmallWorld, <http://www.ASmallWorld.net/about> (last visited June 7, 2012).

232. *Id.*

233. *Terms of Use*, ASmallWorld, <http://www.ASmallWorld.net/terms> (last visited June 7, 2012).

234. *Terms of Service*, SKYROCK, <http://www.skyrock.com/safety/terms.php> (last visited June 7, 2012).

dispute which may arise out of or in connection with these Terms.<sup>235</sup>

These European-based websites violate article 15 of the Brussels Regulation because they purport to require consumers to submit to jurisdiction outside their home court. Twitter, a micro-blogging service, permits users to send “tweets,” or text-based posts no greater than 140 characters via instant messaging or cell phone text messaging. Twitter offers its services “as is” without any warranties or assurance of security.<sup>236</sup> If a consumer ends up litigating against Twitter, they must submit to jurisdiction in San Francisco, California.<sup>237</sup> Facebook’s terms of use agreement bind users to terms of use if they merely browse or access a website<sup>238</sup> and one of the terms is a forum selection clause that states:

You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in

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235. *Terms of Use*, DON’TSTAYIN, <http://www.dontstayin.com/pages/legaltermsuser/> (last updated June 14, 2007).

236.

Without limiting the foregoing, TWITTER AND ITS PARTNERS DISCLAIM ANY WARRANTIES, EXPRESS OR IMPLIED, OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT. We make no warranty and disclaim all responsibility and liability for the completeness, accuracy, availability, timeliness, security or reliability of the Services or any content thereon. Twitter will not be responsible or liable for any harm to your computer system, loss of data, or other harm that results from your access to or use of the Services, or any Content. You also agree that Twitter has no responsibility or liability for the deletion of, or the failure to store or to transmit, any Content and other communications maintained by the Services. We make no warranty that the Services will meet your requirements or be available on an uninterrupted, secure, or error-free basis. No advice or information, whether oral or written, obtained from Twitter or through the Services, will create any warranty not expressly made herein.

*Terms of Service*, TWITTER, <http://twitter.com/tos> (last updated May 17, 2012).

237. *Id.*

238. “Browsewrap is a term used to refer to a proposed agreement (such as website Terms of Use) that is posted, rather than presented as a clickwrap or click-to-accept contract, and, for this reason, may not actually be enforceable unless assent may be implied.” 2 IAN C. BALLON, *E-COMMERCE AND INTERNET LAW* 14.01 (2d ed. 2012). The federal court in *Sw. Airlines Co. v. BoardFirst, L.L.C.*, No. 3:06-CV-0891-B, 2007 WL 4823761, at \* 4 (N.D. Tex. Sept. 12, 2007), noted that “[b]rowsewraps may take various forms but typically they involve a situation where a notice on a website conditions use of the site upon compliance with certain terms or conditions . . . .”

Santa Clara County, California for litigating all such claims.<sup>239</sup>

While U.S. companies are not members of the EU, it is likely that European courts will not enforce judgments where consumers have been summoned to courts in distant forums, such as the United States. In the twenty-seven countries of the European Union, consumers have the absolute right to sue suppliers such as software vendors, content providers, and social networks in their home court. Article 15 of the Brussels Regulation sets the ground rules for determining jurisdiction in all consumer contracts.<sup>240</sup> The Brussels Regulation's consumer protection rules are mandatory, non-waivable provisions.<sup>241</sup> TOUs that attempt to impose choice of forum or venue clauses are unenforceable throughout the Eurozone.

### C. *The Rome I Regulation Governing Choice of Law*

Choice of law principles are used by courts to determine which country's law applies to a contract, such as a TOU or other licensing agreement. In December 2005, the European Legislature approved replacing the Rome I Convention of 1980 with a Community-Wide

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239. *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/terms.php?ref=pf> (last updated Apr. 26, 2011).

240. "Courts in Europe will not enforce one-sided choice-of-law or forum clauses in the business-to-consumer context. European consumers, for example, are not permitted to be divested of their rights to litigate in their home courts by click wrap or other mass-market license agreements." Rustad, *supra* note 218 at 190.

American consumers would greatly benefit from the Brussels Regulation because it bases the rule for which court is competent to entertain a claim based upon the consumer's residence, which gives her a home court advantage. . . . [An] American company domiciled in a Member State can be sued in that state. American online providers have been steadfastly opposed to the Brussels Regulation because they favor mass-market licenses, which require consumers to litigate in their home court and according to their rules. U.S. consumers would benefit from the Brussels Regulation "home court" regime.

*Id.* at 199.

241.

Article 17 of the BRUSSELS Regulation provides that a consumer cannot waive her right to file or defend lawsuits in her local court. European consumers, unlike their American counterparts, have an absolute right to sue a seller or supplier if it "pursues commercial or professional activities in the Member State of the consumer's domicile." . . . In contrast to European courts, Americans [sic] courts broadly enforce choice of forum clauses even when they have the effect of compelling consumers to litigate in the seller's home court at a great distance from their home.

Michael L. Rustad & Maria Vittoria Onufrio, *supra* note 9, 51–52 (2010) (comparing U.S.-style consumer software license agreements to European contracts that are subject to mandatory private international law rules).

Regulation.<sup>242</sup> In application, the scope of both the Rome Convention and the Council Regulation No. 593/2008 were very broad because they applied to the parties of signatory states and even “to parties of non-signatory states when a choice of law dispute comes before a signatory state’s court.”<sup>243</sup>

Article 1 of Rome I explains that the scope of the regulation is to articulate conflict of law rules for contractual obligations in civil and commercial matters.<sup>244</sup> All social networking sites and websites are potentially subject to Rome I’s compulsory choice of law rules. The Rome I Regulation adopted the consumer’s home court rule, which means that for consumer contracts the governing law is the place where a consumer has her “habitual residence.”<sup>245</sup> The special consumer rules apply only to natural persons who have their place of residence in EU Member States. Article 6 defines a consumer as a “natural person for a purpose which can be regarded as being outside his trade or profession.”<sup>246</sup> Article 6 applies to anyone “by any means [that], directs such activities to that country or to several countries including that country.”<sup>247</sup>

All of the Member States of the EU adopted the Rome Convention (the predecessor to the Rome I Regulation) to resolve conflict of law disputes even when one of the parties was located outside of the EU.<sup>248</sup> Article 3 of the former Rome I Convention respects the law chosen by the parties in business-to-business transactions. However, courts must be certain that a party’s choice of law clause will never have the effect of depriving the consumer of the protection afforded to him by the mandatory law of his habitual country.<sup>249</sup> Courts in the Netherlands will apply

242. The Rome I Regulation became effective for the Member States of the European Union on December 17, 2009.

243. Jochen Zaremba, *International Electronic Transaction Contracts Between U.S. and EU Companies and Customers*, 18 CONN. J. INT’L L. 479, 491 (2003); see H. Matthew Horlacher, Note, *The Rome Convention and the German Paradigm: Forecasting the Demise of the European Convention on the Law Applicable to Contractual Obligations*, 27 CORNELL INT’L L.J. 173, 176 (1994) (explaining reach of Convention).

244. “This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.” See European Parliament and Council Regulation 593/2008 (EC), at art. 1(1) [hereinafter *Rome I*] (noting that the “Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.”).

245. *Id.* at art. 6 (explaining mandatory rules for consumer transactions).

246. *Id.* Cf. Brussels Regulation at art. 15.

247. *Id.*

248. Article 1 of the Rome I Convention stated: “[t]he rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.” Article 2, titled “universal application,” added that “[a]ny law specified by this Convention shall be applied whether or not it is the law of a Contracting State.” Horlacher, *supra* note 243, at 176.

249. Such mandatory consumer protection laws include those prohibiting unfair contract terms, limiting the enforceability of standard form contracts, creating rights of cancellation

European-wide choice of law principles even if the parties have chosen U.S. law, provided the transaction is a consumer transaction.<sup>250</sup> “Dutch mandatory consumer protection rules apply between a Dutch customer and a U.S. seller even if the parties have chosen U.S. law, provided the prerequisites of Article 5(2) of the Rome Convention are fulfilled.”<sup>251</sup> The Rome I Convention has functionally equivalent rules to the Rome I Regulation. The only significant difference is that a convention must be approved through a treaty process, whereas a regulation applies automatically to new Member States.

Article 5(2) of the Convention provides the sphere of application for consumer transactions.<sup>252</sup> The Convention applies only if a specific invitation addressed to the consumer precedes the conclusion of the contract.<sup>253</sup> The Convention also applies if the seller furnishes advertising targeted at the country of the consumer’s habitual residence.<sup>254</sup> This provision tacitly assumes that the European consumer has otherwise completed the steps necessary to conclude a contract in that country, or alternatively, that the seller received the consumer’s order in that country. The language of the Rome Convention did not seem targeted to address dispute resolutions in the World Wide Web environment. When the Rome Convention was drafted and signed, the World Wide Web did not exist yet, and as a result, the contracting parties could not take into consideration online transactions. The EU was aware of the difficulties in applying article 5 of the Rome Convention to the new forms of commerce, and for this reason replaced it with the article 6 of the new Council Regulation No.593/2008, which applies to online transactions (as pointed out in the preamble).

Article 6 of the Rome I Convention states that:

[A] contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade

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during a “cooling off” period following the formation of the contract, or requiring that the seller make certain disclosures.

250. Zaremba, *supra* note 243, at 491; Horlacher, *supra* note 243, at 177 (explaining that a U.S. corporation and an Australian client form a contract with an English jurisdictional clause, or if an English court otherwise obtains jurisdiction over their contractual obligation, the English court must abide by the precepts of the Rome Convention when resolving any dispute concerning the parties’ choice of applicable law).

251. Zaremba, *supra* note 243, at 492.

252. See 1980 Rome Convention on the Law Applicable to Contractual Obligations of 26 Jan. 1998, 1998 O.J. (C 027) (“Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence . . .”).

253. *Id.* at art. 5.

254. *Id.*

or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional: (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.<sup>255</sup>

Certainly, an online transaction can be included in article 6(b). It is interesting to note that article 6(b) reproduces exactly the content of article 15(1)(c) of the Council Regulation EC No. 44/2001, which governs the cross-border jurisdiction issues over consumer contracts.

Both regulations refer to the concept of directed activity as a condition for applying the consumer protection rule. In this way, the factors used to establish the application of the consumer's domestic laws are the same factors used to establish the jurisdiction of the consumer's home state forum. This means that a U.S. company, which solicits conclusion of on-line contracts and concludes a contract in a European Member State where the consumer has his habitual residence, can be sued in this Member State and the consumer-friendly law of this Member State shall apply. Legal academics contend that European consumers may never waive consumer protection available in their home court jurisdiction.<sup>256</sup>

As a result, consumer protection issues pose a particular risk to a U.S. software company targeting consumers of any European country because of Rome I's mandatory consumer protection rules for choice of law as well as its extraterritorial application. Mandatory consumer protection rules mean that European consumers may never be divested of their home court or national consumer laws.<sup>257</sup> Social networks such as Second Life sell virtual

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255. *Id.* at art. 6.

256. The application of Brussels regulation is considered controversial by the doctrine. Nevertheless, courts apply the Regulation beyond European boundaries. For a list of cases regarding the extraterritorial application of Brussels Regulation, see Kerry J. Begley, Note, *Multinational Patent Enforcement: What the "Parochial" United States Can Learn from Past and Present European Initiatives*, 40 CORNELL INT'L L.J. 521, 547 (2007); see also Michael Rustad, *E-Commerce: Challenge to Privacy, Integrity and Security in a Borderless World: Circles of E-Consumer Trust: Old E-America v. New E-Europe*, 16 MICH. ST. J. INT'L L. 183, 199 n.53 (2007) (quoting *Air Canada v. United Kingdom*, 20 Eur. H.R. Rep. 150 (1995), where the European Court of Human Rights held that the seizure of an aircraft belonging to the Canadian applicant had not infringed article 1 of the First Protocol, suggesting that the fact that the applicant was a resident in Canada affected its rights under that provision).

257. The application of the Brussels Regulation to U.S. or other non-EU parties is a controversial extension of the pro-consumer rules. Nevertheless, courts have applied Brussels Regulation consumer rules to non-EU sellers. See Begley, *supra* note 256 at 547 (citing cases where foreign courts have extended the Brussels Regulation's consumer rules to non-EU sellers); see also Rustad, *supra* note 256, at 199 n.53 (2007) (quoting *Air Canada v. United Kingdom*, 20 Eur. H.R. Rep. 150 (1995)) (citing European Court of Human Rights

products and services but many other sites are used only for word-of-mouth advertising “amplified through the megaphone of technology like smartphones and computers.”<sup>258</sup> If a social network site targets consumers in Member States, it is likely that the Rome I Regulation will determine the choice of law. Similarly, if a software publisher or other content creator is from one Member State and its customer from another, Rome I will determine the choice of law a European court will apply. Couchsurfing, a social networking site, would violate both the Brussels and Rome I Regulations because of its terms of service that require either mandatory arbitration or litigation in the company’s home court of New Hampshire.<sup>259</sup> U.S. software publishers and social networking sites ignore these compulsory rules to their peril if they are targeting European consumers with their licensing activities.<sup>260</sup>

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cases where the court held that the seizure of an aircraft belonging to a Canadian applicant did not infringe article 1 of the First Protocol, and suggested that the fact that the applicant was a resident in Canada affected its rights under that provision).

258. Ron Ruggless, *Restaurant Social Media: Looking for the ROI*, NATION’S RESTAURANT NEWS (Oct. 30, 2011), <http://www.nrn.com/article/restaurant-social-media-index-looking-roi>.

259. The terms of use on the Couchsurfing website include the following language:

- (a) Binding Arbitration. For any Claim (excluding Claims for injunctive or other equitable relief) where the total amount of the award sought is less than Ten Thousand US Dollars (US\$10,000), you or we may elect to resolve the dispute through binding arbitration conducted by telephone, on-line and/or based solely upon written submissions where no in-person appearance is required. In such cases, the arbitration shall be administered by the American Arbitration Association in accordance with its applicable rules, or any other established ADR provider agreed upon by the parties. Any judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.
- (b) Court. Alternatively, any Claim may be adjudicated by a court of competent jurisdiction located in New Hampshire, USA or where the defendant is located (in our case Carroll County, New Hampshire, USA, and in your case your home address). You and we agree to submit to the personal jurisdiction of a state court located in Carroll County, New Hampshire or a US federal court located in Concord, New Hampshire.

*Terms of Use*, COUCHSURFING, <http://www.couchsurfing.org/terms.html> (last updated July 13, 2011)

260.

Foreign businesses operating in Europe also should not assume that a choice of law or exclusive jurisdiction clause selecting non-European law/courts will allow them to escape the consequences of this case. Such businesses may be subject to jurisdiction in European courts whether they operate through a subsidiary or not. For example, if a contract between a US business and a European consumer provided that New York law will govern the contract, a European court may strike the choice of law provision as being unfavorable to the consumer or an unfair contract term because it seeks to circumvent mandatory local law and/or European law provisions protecting consumers. Thus, foreign businesses should not view choice of law or exclusive jurisdiction clauses as being a means to avoid the restrictive consumer laws in Europe.

### III. SUBSTANTIVE CONTRACTUAL PROTECTIONS FOR EUROPEAN CONSUMERS

U.S. courts are reluctant to police substantive terms in consumer TOUs and generally police only the bargaining process. The recent trend is for courts to enforce “cash now, terms later” agreements so long as they comply with minimal procedural standards. The American Law Institute’s Principles of the Law of Software Contracts defers largely to software industry practices when it comes to consumer TOUs.<sup>261</sup> However, the Principles adopt a provision requiring software publishers to give a non-disclaimable warranty that its product “contains no material hidden defects of which the transferor was aware at the time of the transfer.”<sup>262</sup> The duty to disclose hidden defects is not recognized in either UCC Article 2 or the Uniform Computer Information Transactions Act (UCITA).<sup>263</sup> Neither UCITA nor the Principles of the Law of Software Contracts have extensive consumer rules. The word consumer is found nowhere within UCC Article 2 governing sales of goods. The marketplace approach used in these source of law are dramatically different from the Eurozone’s social welfaristic approach to licensing, which favors non-waivable procedural and substantive protection.

UCITA follows the majority rule of U.S. courts in its broad validation of rolling contracts. However, UCITA gives consumers a right to a refund if they have not had an opportunity to review the terms.<sup>264</sup> The predominant trend is for U.S. courts to legitimize software industry consumer licensing practices that disclaim warranties.<sup>265</sup> A recent empirical study found that fifty-three out of fifty-four Internet retailers studied disclaimed all warranty protection for their products.<sup>266</sup> The Federal Trade Commission’s Bureau of Consumer Protection criticized

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*B2C in Europe and Avoiding Contractual Liability: Why Businesses with European Operations Should Review their Customer Contracts Now*, DROIT & TECHNOLOGIES (Sept. 15, 2004), <http://www.droit-technologie.org/actuality-805/b2c-in-europe-and-avo%20Id.ing-contractual-liability-why-businesses-with.html>.

261. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS (2009).

262. *Id.* § 3.05(b).

263. Neither the UCC nor UCITA recognize a warranty to disclose hidden defects. UCITA broadly legitimates mass-market licenses for consumer transactions. UCITA, adopted by Maryland and Virginia, enforces contracts where consumers have an opportunity to review terms and a means of manifesting assent. Rustad & Koenig, *supra* note 99, at 1565 (2005) (discussing provisions of UCITA that validate mass-market licenses).

264. See Raymond T. Nimmer, *Licensing of Information Assets*, 2 INFO. LAW § 11:147 (2009) (explaining conditions of consumers’ right to a refund).

265. See Robert W. Gomulkiewicz, *The Implied Warranty of Merchantability in Software Contracts: A Warranty No One Dares to Give and How to Change That*, 16 J. MARSHALL J. COMPUTER & INFO. L. 393, 393 (1998) (describing trend in American courts).

266. See Hillman & Barakat, *supra* note 127, at 6 (describing results from study).



UCITA because it validated consumer TOUs in which the consumer received no presale disclosure of material terms. “UCITA does not require that licensees be informed of licensing restrictions in a clear and conspicuous manner prior to the consummation of the transaction.”<sup>267</sup>

Neither UCITA nor the Principles of the Law of Software Contracts have extensive consumer rules for software licenses. The marketplace approach varies dramatically from the EU’s social welfaristic approach to licensing that favors mandatory rules. U.S. courts will police contracts but largely defer to the consumers’ supposed freedom of contract and duty to read.<sup>268</sup> These polar opposite approaches to protecting consumers result in disputes since the Internet does not respect national boundaries.

#### A. *Unfair Contract Terms Directive*

When the European Legislature enacted the 1993 Unfair Contracts Term Directive (UCTD), consumers gained Eurozone-wide rights and remedies.<sup>269</sup> The European Legislature put the touch of fire in community-wide protection when it enacted the UCTD. The European Legislature acknowledged that “[i]n consumer contracts, sellers and suppliers possess a considerable advantage by defining the terms in advance that are not individually negotiated.”<sup>270</sup> The EU acknowledged that standard form contracts were valuable; so long as “abuses can be prevented, [they] can also work to the advantage of consumers.”<sup>271</sup> The UCTD was a thunderbolt falling on an inch of ground, but lighting the horizons of consumers

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267. Letter from Fed. Trade Comm’n, Bureau of Consumer Prot., to John L. McClaugherty, Chair, Exec. Comm., Nat’l Conference of Comm’rs on Unif. State Laws (July 9, 1999), *available at* <http://www.ftc.gov/be/v990010.shtm>.

268. Defenders of U.S.-style TOUs acknowledge that license agreements are written in dense and sometimes unclear language:

Using simple, clear, and concise language is an ongoing challenge for software lawyers. Contract terms expressed in dense legalese make it difficult for the EULA to provide useful information to the end user and to provide effective warnings against piracy.

Gomulkiewicz & Williamson, *supra* note 30, at 366.

269. Council Directive 93/13, 1993 O.J. (L 95) (EC) [hereinafter Council Directive 93/13].

270. *Unfair Contract Terms*, EUROPA, [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/unf\\_cont\\_terms/index\\_en.htm](http://ec.europa.eu/consumers/cons_int/safe_shop/unf_cont_terms/index_en.htm) (last visited Mar. 27, 2011).

271. *Id.*

Whereas in accordance with the principle laid down under the heading “Protection of the economic interests of the consumers”, as stated in those programmes: “acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts . . . .”

Council Directive 93/13, *supra* note 269, at 30.

throughout the Eurozone. The preamble to the UCTD provided:

Whereas persons or organizations, if regarded under the law of a Member State as having a legitimate interest in the matter, must have facilities for initiating proceedings concerning terms of contract drawn up for general use in contracts concluded with consumers, and in particular unfair terms, either before a court or before an administrative authority competent to decide upon complaints or to initiate appropriate legal proceedings; whereas this possibility does not, however, entail prior verification of the general conditions obtaining in individual economic sectors;

Whereas the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts . . . .<sup>272</sup>

For the first time, this Directive recognized the right of European courts, administrative bodies, or consumer advocacy groups to police unfair contract terms because they have a “legitimate interest under national law in protecting consumers.”<sup>273</sup>

The UCTD applies broadly to non-negotiated contracts between professionals and consumers.<sup>274</sup> The UCTD requires each Member State to enact national legislation that meets the minimum standards.<sup>275</sup> Contractual provisions determined to be unfair under the Directive are unenforceable.<sup>276</sup>

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272. Council Directive 93/13, *supra* note 269, at 31.

273. *Id.* at art. 7(2). One of the most commented-upon applications of the mentioned Directive is Union Federale des Consommateurs (UFC) “Que Choisir” v. AOL Bertelsmann Online France, Tribunal de Grande Instance [TGI] [ordinary court of original jurisdiction] Nanterre, 1e ch., June 2, 2004, R.G. No. 02/03156 (tgin020604) (Fr.). After the Council introduced the Directive 93/13/EC and its consequent implementation during the following years into the legal systems of European Member States, a legal action against a electronic commerce to redress unfair terms became a reality. This is not just an isolated case because in Germany, America Online agreed to cease and desist and to pay a fine of about 1000 Euros each time it used violating terms, up to a maximum of 10,000 Euros per contract. Rustad & Onufrio, *supra* note 9.

274. Council Directive 93/13, *supra* note 269.

275. A consumer advocate contends that seven out of the twenty-seven EU Member States enacted national legislation implementing the Unfair Contract Directives that were not in conformity with the spirit of the legislation. He contends that these Member States unfairly increased the burden for consumers by enacting legislation that refers to “significant imbalance” without expressly including the element of good faith. Martin Ebers, *Unfair Contract Terms Directive (93/13)*, CONSUMER LAW COMPENDIUM 341.

276. “Terms that are found unfair under the Directive are unenforceable for consumers. The Directive also requires contract terms to be drafted in plain and intelligible language and states that ambiguities will be interpreted in favour of consumers.” *Unfair Contract Terms*, EUROPA, [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/unf\\_cont\\_terms/index\\_en.htm](http://ec.europa.eu/consumers/cons_int/safe_shop/unf_cont_terms/index_en.htm) (last updated Apr. 7, 2007). Member States vary in their treatment of unfair terms. “However, in some member states the contractual rights and obligations can generally be adjusted, not only concentrating on the specific unfair term. Furthermore, in some member

The UCTD also requires contract terms to be drafted in plain and intelligible language and states that ambiguities shall be interpreted in favor of consumers.<sup>277</sup> Courts in Europe apply the principle of *interpretatio contra proferentem* to enforce ambiguities in favor of consumers.<sup>278</sup> European courts may reject insufficiently precise contract terms in consumer contracts even if they are not substantively unfair.<sup>279</sup> Article 3(1) of the UCTD, which defines unfairness, states that it applies to contracts that have not been individually negotiated.<sup>280</sup> The Directive defines a contract “as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”<sup>281</sup> The language of the Directive mandates courts to apply a two-part test to determine whether a given contractual provision is unfair.<sup>282</sup> First, there must be a significant imbalance to the detriment of the consumer and that imbalance should be “contrary to good faith.”<sup>283</sup> Nevertheless, the prevailing—and more correct interpretation of the UCTD—is that any contractual term in a consumer contract causing a significant imbalance is by definition contrary to the principle of good faith.<sup>284</sup> Under this interpretation, a court, consumer

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states public bodies can request the incorporation of new terms in order to prevent a significant imbalance between the rights and obligations.” Martin Ebbers, *Unfair Contract Terms Directive (93/13)*, *Consumer Law Compendium: Comparative Analysis 5* (2007), available at [http://www.eu-consumer-law.org/consumerstudy\\_part2c\\_en.pdf](http://www.eu-consumer-law.org/consumerstudy_part2c_en.pdf) (last visited June 8, 2012).

277. Council Directive 93/13, *supra* note 269, at art. 5.

278. PETRI MÄNTYSAARI, *THE LAW OF CORPORATE FINANCE: GENERAL PRINCIPLES AND EU LAW: VOLUME II: CONTRACTS IN GENERAL* 96 (2009) (stating that court must apply *contra proferentem* to consumer contracts because of the Unfair Contract Terms Directive).

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For example, in a judgment of January 7, 1997, in *Assurances GAN v. Impec*, the Belgian Court of Cassation deemed unfair a term waiving a guarantee in respect of “certain damages” on the grounds that an exclusion clause could not be validly relied on against the insured unless the clause in question was “clear, express and limited.” Likewise, in a judgment of May 23, 1996, in *NCR-ANC v UAP*, a French Court of First Instance ruled that an insurance contract was unfair because it did not subject increases in the premium to any clear contractual condition and gave the insurance company an unfair advantage because it did not have to justify any increase in the premiums.

*B2C in Europe and Avoiding Contractual Liability*, *supra* note 260.

280. Council Directive 93/13, *supra* note 269, at art. 3(1) (“A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”).

281. *Id.*

282. James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 *YALE J. INT’L L.* 109, 134 (2003).

283. *Id.* at 135.

284. *Id.*

administrative agency or authority will deploy the UCTD to strike down oppressive terms in consumer contracts such as TOUs. The language in article 3 of the UCTD addresses newly emergent terms not found in the Annex. An Annex to the UCTD is a non-exclusive list of terms considered suspect under article 3(3).

This list invalidates many common terms in U.S.-style terms of use: disclaimer of warranties, limitations of licensor's liability, unilateral modifications to contract terms, and the acceptance of the license agreement by performance. If a given term in a license agreement is not addressed in the Annex of suspect terms, the court may turn to a more general test of unfairness. However, article 8 provides that Member States have the discretion to adopt more stringent provisions.<sup>285</sup> They could, for example, transform the gray list into a black list.<sup>286</sup> This is because the UCTD sets only minimum standards, which can be heightened by the EU Member States in order to ensure a higher degree of protection than for the consumer in the United States. Comparing the provisions of unfair terms and the American unconscionability doctrine, it becomes apparent that the UCTD recognizes a much lower limit for intervention by European courts than UCC § 2-302.<sup>287</sup> The UCC's doctrine of unconscionability applies only where the consumer is left with no meaningful choice, which is a difficult threshold to attain.<sup>288</sup> "[T]he elements of procedural and substantive unconscionability must *both* be present before a court may refuse to enforce a contract."<sup>289</sup> An arbitration clause in a TOU is unconscionable only if: (1) the "provision was presented on a take-it-or-leave-it basis"; and (2) there was "an inequality of bargaining power that result[ed] in no real negotiation and an absence of meaningful choice."<sup>290</sup>

In contrast, European courts and consumer agencies may review all

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285. Article 8 of Council Directive 93/13 provides: "Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer." Council Directive 93/13, *supra* note 269, at art. 8.

286. A contractual term appearing on a gray list is essentially a presumption of unfairness that can be overcome by contrary evidence. In contrast, black list terms are prohibited outright and are *per se* regarded as unfair. WADE JACOBY, *THE ENLARGEMENT OF THE EUROPEAN UNION AND NATO: ORDERING FROM THE MENU IN CENTRAL EUROPE* 71 n.32 (2005).

287. See Nicola Lucchi, *Countering the Unfair Play of DRM Technologies*, 16 TEX. INTEL. PROP. L.J. 91, 118 (2007) (noting the lower limit for intervention in European courts).

288. See, e.g., *Amoco Oil Co. v. Ashcraft*, 791 F.2d 519, 522 (7th Cir. 1986) (reasoning that unconscionability is not available for courts to strike down contracts which are one-sided where there is no evidence of deception, lack of agreement or compulsion).

289. *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 107 Cal. Rptr. 2d 645, 654 (2001) (emphasis in original).

290. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1281 (9th Cir. 2006).

non-negotiated contracts for unfairness

taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.<sup>291</sup>

However, article 4(2) provides that this test does not apply to core terms, including “neither . . . the definition of the main subject matter of the contract nor . . . the adequacy of the price and remuneration.”<sup>292</sup> The UCTD is a robust tool for European courts seeking to strike down one-sided TOUs with hidden terms.

#### B. *The Directive on Unfair Commercial Practices*

The EC Directive 2005/29/EC on Unfair Commercial Practices is equally applicable to consumer license agreements and terms of service. For example, a consumer may decide whether to buy a product, or alternatively, to exercise some related contractual right based upon a misleading practice.<sup>293</sup> The European Directive deploys two different concepts: active misleading practice, which focuses on false or deceptive information provided to the consumer,<sup>294</sup> and misleading practice, which addresses when the licensor omits key information.<sup>295</sup> Article 6 covers misleading practices that shape economic behaviour, in particular, the existence and nature of the product, its main characteristics, and other qualities.<sup>296</sup> Article 7 treats a commercial practice as misleading if material information that the average consumer needs to make an informed transactional decision is omitted from the consumer transaction.<sup>297</sup>

Article 8 of the Directive states that unfair practice includes any

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291. Council Directive 93/13, *supra* note 269, at art. 4(1).

292. *Id.* at art. 4(2).

293. Lucchi, *supra* note 287, at 119.

294. Council Directive 2005/29, art. 6, 2005 O.J. (L 149) (EC).

295. *Id.* at art. 7.

296. *Id.* at art. 6 (explaining meaning of misleading actions and giving examples).

297.

A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

*Id.* at art. 7(1).

aggressive commercial practice that significantly impairs the average consumer's freedom of choice and therefore causes him to make a transactional decision he or she would not have made otherwise.<sup>298</sup> In addition, the Uniform Commercial Practice Directive includes in the Annex a list of practices that shall be in all circumstances regarded as misleading.<sup>299</sup> This Directive provides a possible template for establishing internet-related consumer protection for digital media transactions in the European electronic marketplace.<sup>300</sup>

### C. *Distance Selling Directive*

The Distance Selling Directive accords consumers who purchased goods through home shopping and other distance communications the same rights as if they had purchased these goods in person.<sup>301</sup> The European Legislature enacted the Distance Selling Directive to promote cross-border consumer confidence.<sup>302</sup> The Distance Selling Directive 97/7/EC applies to home shopping, including e-commerce teleshopping and the use of the Internet.<sup>303</sup> Sellers must also give a consumer written confirmation of information in any durable medium.<sup>304</sup> The Distance Selling Directive requires suppliers to give consumers pre-contractual disclosures such as information about the identity of the supplier and the main characteristics of goods and services, which includes taxes, delivery costs, arrangements for payment, the existence of a right of withdrawal, the period for which the offer remains valid, and the minimum duration of the contract.<sup>305</sup>

Any e-business or software company must make pre-contractual disclosures as well as confirmatory disclosures no later than the time it delivers hardware or software.

Suppliers, including software publishers, may not penalize consumers for canceling a distance contract but they may assess costs of returning the item.<sup>306</sup> European consumers have a minimum seven-day "cooling-off" period for contracts made away from the seller's place of business that

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298. *Id.* at art. 8.

299. *Id.* at Annex 1 (stating examples of misleading practices).

300. Lucchi, *supra* note 287, at 119.

301. The aim of EC legislation in the field of distance selling is to put consumers who purchase goods or services through distance communication means in a similar position to consumers who buy goods or services in shops." *Distance Selling*, EUROPA, [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/dist\\_sell/index\\_en.htm](http://ec.europa.eu/consumers/cons_int/safe_shop/dist_sell/index_en.htm) (last visited June 8, 2012).

302. Council Directive 97/7, art. 4, 5, 1997 O.J. (L 144) (EC).

303. *Id.* at art. 7.

304. *Id.* at art. 5.

305. *Id.* at art. 4.

306. *Id.*

presumably includes websites or products purchased online.<sup>307</sup> The consumers' right of withdrawal does not apply to software contracts if the product is unsealed by the consumer.<sup>308</sup> This means that the Directive's right of withdrawal is also inapplicable to clickwrap agreements where the consumer downloads the software from the internet.<sup>309</sup> Consumers have the right to cancel the contract if the seller is unable to deliver the goods or services within thirty days.<sup>310</sup> These are non-waivable mandatory terms. The "cooling-off" period and guaranteed refund provisions gives European e-commerce consumers an opportunity to inspect goods and reject them just as if they were in a brick and mortar shop.

Consumers have the right to cancel a distance sale if the seller is unable to deliver the goods or services within thirty days.<sup>311</sup> The European Directive exempted certain distance sales from its application. Examples of exempted distance sales include construction contracts, financial services, contracts made by vending machines, auctions, and public pay telephones.<sup>312</sup> A remote software licensor must inform European consumers of their right of withdrawal and offer a refund payable within 30 days.<sup>313</sup> Article 2 of the Distance Selling Directive states the basic definitions key to the sphere of operation of the directive:

- (1) 'distance contract' means any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded;
- (2) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes, which are outside his trade, business or profession;
- (3) 'supplier' means any natural or legal person who, in contracts covered by this Directive, is acting in his commercial or professional capacity;
- (4) 'means of distance communication' means any means, which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract

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307. *Id.* at art. 6

308. *Id.* at art. 6(3).

309. Software downloadable from the internet technically has no seal or shrinkwrap plastic. But the principle will likely be extended to downloadable software. The software industry would no longer be profitable if the right of withdrawal applied to downloadable software.

310. Council Directive 93/13, *supra* note 269, at art. 7.

311. *Id.*

312. *Id.* at art. 3.

313. Council Directive 97/13, *supra* note 269, at art. 7(2).

between those parties. An indicative list of the means covered by this Directive is contained in Annex I;

(5) ‘operator of a means of communication’ means any public or private natural or legal person whose trade, business or profession involves making one or more means of distance communication available to suppliers.<sup>314</sup>

#### D. *The Directive on Consumer Rights*

The EU Commission considered the Distance Seller’s Directive to be outdated and not fully responsive to the new market demand, especially in light of the most recent technological changes such as website contracts.<sup>315</sup> The new directive provided a standard set of EU-wide consumer rights.<sup>316</sup> The new consumer rights directive replaces a “patchwork of 27 sets of different rules.”<sup>317</sup> This EU regulatory fragmentation was considered a relevant barrier to cross-border transactions because it increased costs to traders and undermined consumer confidence in internal markets.<sup>318</sup> The Commission was cognizant that the only way to eliminate these trade barriers was to create a uniform regulatory framework protecting consumer at the Union level.<sup>319</sup> The Directive on Consumer Rights displaces the 97/7/EC distance-selling directive and the 85/577/EC directive on the protection of consumers regarding contracts negotiated away from business premises. The Directive does not permit EU Member States to enact national legislation that conflicts with the Directive.<sup>320</sup> This includes more

314. *Id.* at art. 2.

315. *EU Council and the European Parliament approved a New Consumer Rights Directive*, POLISH PRESIDENCY IN THE EU, <http://www.prezydencja.uokik.gov.pl/en/new-directive> (last visited June 8, 2012).

316. Press Release, Europa, Consumers: Commission Proposes EU-Wide Rights for Shoppers, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1474&format=HTML&aged=0&language=EN> (last visited June 8, 2012).

317.

These Directives contain certain minimum requirements; Member States have added rules in an uncoordinated manner over the years, making EU consumer contract laws a patchwork of 27 sets of differing rules for example: a mix of differing information obligations, differing cooling off periods ranging from 7 to 15 days and differing obligations in relation to refunds and repairs.

*Id.*

318. “The aim is to boost consumer confidence and at the same time to cut red tape which is holding back business within national borders—denying consumers more choice and competitive offers. A standard set of consumer contract terms will cut compliance costs substantially—by up to 97% for EU wide traders.” *Id.*

319. *Id.*

320. EU Parliament & Council Directive on Consumer Rights 2011/83/EU (Oct. 25 2011), amending Council Directive 93/13/EEC and EU Parliament & Council Directive 1999/44/EC and repealing Council Directive 85/577/EEC and EU Parliament & Council



or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in the Directive.<sup>321</sup>

The new Directive provides a list of uniform disclosures that the seller must give to the consumer before the conclusion of the contract including: the main characteristics of the goods or services, the identity of the trader, the geographical address at which the trader is established, the trader's contact information, the total price of the goods or services inclusive of taxes and all additional delivery or postal charges, and whether any returns charges are payable by the consumer.<sup>322</sup>

The seller also must inform the consumer about whether they have a right of withdrawal.<sup>323</sup> Where a right of withdrawal exists, the conditions and procedures for exercising that right must be specified.<sup>324</sup> Conversely, the circumstances under which the consumer will lose his right of withdrawal must also be disclosed.<sup>325</sup> The trader must also inform the consumer of any technical protection measures of digital content, which includes not only digital rights management but also more invasive technologies such as DVD regional codes or tracking and monitoring tools.<sup>326</sup> In addition, the trader must inform the consumer of any relevant interoperability of digital content with hardware and software that the trader has knowledge or a reason to know of its existence.<sup>327</sup> Under the new Directive the original period of seven days to withdraw from a distance contract is extended to fourteen days starting the day on which the consumer acquires physical possession of the goods.<sup>328</sup> If the trader has not provided the consumer with the information on the right of withdrawal, the withdrawal period shall expire twelve months from the end of the initial withdrawal period.<sup>329</sup> The Directive's provision on the right of withdrawal does not apply to the supply of sealed audio or video recordings and sealed

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Directive 97/7/EC, at art. 4 ("Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.").

321. "This Directive should therefore lay down standard rules for the common aspects of distance and off-premises contracts, moving away from the minimum harmonisation approach in the former Directives whilst allowing Member States to maintain or adopt national rules in relation to certain aspects." EU Parliament & Council Directive on Consumer Rights 2011/83/EU (Oct. 25 2011), amending EU Parliament & Council Directives 93/13/EEC and 1999/44/EC and repealing EU Parliament & Council Directives 85/577/EEC and 97/7/EC, at pref. cl. 2.

322. *Id.* at art. 6(a–g).

323. *Id.* at art. 6(h).

324. *Id.*

325. *Id.* at art. 6(k).

326. *Id.* at art. 6(r).

327. *Id.* at art. 6(s).

328. *Id.* at art. 9.

329. *Id.* at art. 10.

computer software that are unsealed by the consumer after delivery.<sup>330</sup> They also do not apply to digital content not supplied on a tangible medium if the performance began with the consumer's prior express consent regarding loss of his right of withdrawal.<sup>331</sup>

If the trader wishes the consumer to bear the costs of return, the trader is obliged to clearly inform the consumer about this risk before the purchase, otherwise the trader will bear such costs.<sup>332</sup> In light of the new rules of transparency, the trader shall seek the express consent of the consumer to any extra payment in addition to the remuneration agreed upon for the trader's main contractual obligation.<sup>333</sup> If the trader has not obtained the consumer's express consent but has inferred it by using default options, such as pre-checked boxes that the consumer must uncheck in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.<sup>334</sup> Member States shall prohibit traders from charging consumers extra fees because of the use of a particular means of payment, such as a credit card.<sup>335</sup>

The Directive was approved by the Parliament on June 23, 2011 and by the Council on October 11, 2011. After the entry into force of the Directive, the Member States shall have two years to implement its provisions into their national law. Consumer groups were broadly satisfied with the new regulation as it strikes a fair balance between consumer rights and business interests.<sup>336</sup>

#### IV. TEN THINGS WRONG WITH U.S. -STYLE TERMS OF SERVICE: A ROADMAP FOR REFORM

TOUs are a controversial new form of standard form contract, where consumers divest themselves of all rights where the licensor skews terms and conditions in its favor. Robert Gomulkiewicz found over one hundred law review articles that were critical of these standard form contracts for the period from 1984 to 1994.<sup>337</sup> The empirical reality is that few social networking site users would be aware that they waive their implied

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330. *Id.* at art. 16(i).

331. *Id.* at art. 16(m).

332. *Id.* at art. 14.

333. *Id.* at art. 22.

334. *Id.*

335. *Id.* at art. 19.

336. *SMEs Balk at New Consumer Rights Directive*, EURACTIV (June 27, 2011), <http://www.euractiv.com/consumers/smes-balk-new-consumer-rights-directive-news-505974>.

337. Gomulkiewicz, *supra* note 265, at 393 (finding 116 law review articles published in the decade between 1984 and 1994 addressing TOUs; most articles called for radical reformation of this contracting practice for the consumer market).

warranty of merchantability, surrender their right to file suit in a court of law, and agree to submit to arbitration in a distant forum by the mere act of cracking open shrinkwrap, clicking on an icon labeled “I agree” or merely accessing a website. In the past fifteen years, a large number of academics have called for radical reform of standard form TOUs.<sup>338</sup> U.S. consumers have a love/hate relationship with standard form contracts because they are efficient notwithstanding their one-sided nature.<sup>339</sup> An industry pundit accuses software lawyers of employing the legal fiction of a contract while imposing outrageously unfair terms on the consumer marketplace:

We seem to have sunk to a kind of playground system of forming contracts. Tag, you agree! Lawyers will tell you that you can form a binding agreement just by following a link, stepping into a store, buying a product, or receiving an email. By standing there, shaking your head, and shouting “NO NO NO I DO NOT AGREE,” you agree to let the other guy come over to your house, clean out your fridge, wear your underwear and make some long-distance calls.<sup>340</sup>

The next section presents ten things that need to be reformed so that U.S.-style TOUs may safely export their information-based platforms to Europe and beyond. Content creators will not be able to limit, modify, or supersede mandatory consumer rules if they export information-based consumer products to any of the twenty-seven countries of the European Union. U.S. companies are already facing lawsuits and consumer actions because of their failure to conform their TOUs to legal cultures that respect privacy and consumer rights. CompuServe, for example, was assessed a fine of up to €250,000 and a contempt of court judgment against the CEO if the provider should continue to incorporate unfair terms in its terms of

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338. See, e.g., Richard Warner, *Turned on its Head?: Norms, Freedom, and Acceptable Terms in Internet Contracting*, 11 TUL. J. TECH. & INTELL. PROP. 1 (2008) (critiquing TOUs and clickwrap agreements for incorporating anti-transfer, anti-assignment, anti-reverse engineering and other terms inconsistent with norms).

339. Professor Amy Schmitz describes the way in which American consumers have:  
 . . . [a] love/hate relationship with form terms. On the one hand, consumers admit that they have no interest in reading form contracts, enjoy the convenience and efficiency of form contracting, and routinely accept forms “dressed up” as deals without stopping to read or question their content. On the other hand, consumers are often frustrated with the effectively nonnegotiable nature of these contracts and complain that they lack the requisite time or understanding to read or negotiate companies’ impenetrable purchase terms.

Amy J. Schmitz, *Pizza-Box Contracts: True Tales of Consumer Contracting Culture*, 45 WAKE FOREST L. REV. 863, 864–65 (2010) (arguing that consumers bear some responsibility for acquiescing to the stronger party “run[ning] roughshod over their rights”).

340. Cory Doctorow, *Shrinkwrap Licenses: An Epidemic of Lawsuits Waiting to Happen*, INFO. WEEK, Feb. 7, 2007, at 1.

use.<sup>341</sup> Germany, like all EU countries, adopted the Data Protection Directive. The German Data Protection Authority is considering legal action against Facebook because they are collecting biometric features of users without informing them or obtaining their consent.<sup>342</sup> This section presents ten pathways to reforming U.S.-style TOUs. U.S. companies, at a minimum, will need to address these issues if they export information-based consumer products to the European Union. The troublesome features of TOUs need to be localized to avoid liability and protect consumer rights in the Eurozone.

*A. First Point: What's Wrong With Warranty Disclaimers*

Warranty disclaimers that eliminate all protection for consumers are ubiquitous in U.S.-style TOUs.<sup>343</sup> Software publishers contend that warranty provisions limiting liability result in lower product pricing and that such a result could not occur if a software publisher had unlimited liability. The unfair aspect of TOUs is that they eliminate all warranties, thereby eliminating consumer breach of warranty remedies in the event that software or other content is defective and causes harm. In Professor Marotta-Wurgler's study, a little over a third of her sample included limited warranties in their TOUs (not advertised separately).<sup>344</sup> To put it bluntly, European courts are unreceptive to TOUs that disclaim all warranties and provide no meaningful remedy for service interruptions. The *Union Fédérale des Consommateurs v. AOL France*<sup>345</sup> court refused to enforce AOL's standard term contract that disclaimed all liability for service interruptions. French courts take a proactive role in policing consumer TOUs. In *Union Fédérale de Consommateurs v. AOL France*<sup>346</sup> the French court struck down thirty-six clauses in AOL France's (hereinafter AOL)

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341. Maxeiner, *supra* note 282 at 164.

342. See, e.g., Steven Musil, *Facebook Faces Lawsuit Over Facial Recognition Feature*, CNET (Nov. 10, 2011, 5:10 PM), [http://news.cnet.com/8301-1023\\_3-57322815-93/facebook-faces-lawsuit-over-facial-recognition-feature/](http://news.cnet.com/8301-1023_3-57322815-93/facebook-faces-lawsuit-over-facial-recognition-feature/) ("Facebook has introduced this feature in Europe, without informing the user and without obtaining the required consent. Unequivocal consent of the parties is required by both European and national data protection law.").

343. Bebo, a social networking site, is typical in disclaiming warranties and limiting the possibility of a consumer recovering any damages arising out of the use of its platform. *Terms of Use*, BEBO, <http://www.bebo.com/TermsOfUse2.jsp> (last updated Apr. 19, 2011); see also *Terms of Service*, TAGGED, [http://www.tagged.com/terms\\_of\\_service.html](http://www.tagged.com/terms_of_service.html) (providing membership services on "AN 'AS IS' BASIS, WITHOUT ANY WARRANTIES OF ANY KIND") (last updated Sept. 30, 2011).

344. Marotta-Wurgler, *supra* note 52, at 703.

345. R.G. N 02/03156 (tgin020604), Tribunal de Grande Instance [T.G.I.] [ordinary court of original jurisdiction] Nanterre, 1e ch., June 2, 2004 (Fr.).

346. *Id.*

standard terms of use agreement, and further required the online provider to remove those clauses from their TOUs within one month. Additionally, the court fined AOL for each day it delayed removing the objectionable clauses. The court ruled that AOL had a duty to notify its French customers of the resulting changes to its terms of use. The French court imposed a fine of €30,000 against AOL and ordered the online provider to publish the substantive parts of the court's judgment on its website and in three national daily newspapers.<sup>347</sup> Some of the unenforceable clauses in AOL's TOU included:

- [E]ntitle the ISP to unilaterally modify the offered service without the consumer's express consent (except where allowed by law);
- entitle the ISP to unilaterally modify the amount of the service fees in fixed-term agreements without the consumer's express consent, even if the consumer may terminate the agreement;
- limit all obligations of the ISP to best effort obligations;
- exonerate the ISP from its obligation to ensure access to the offered service in the event of a breakdown;
- allow the ISP to terminate the agreement in the event of the consumer in the even "imprecise" obligations (e.g., "abnormal use of service") or the consumer's refusal to pay, even if such refusal is justified;
- make the consumer liable both for liquidated and normal damages in the event of termination of the agreement for breach; and
- provide that notices sent by e-mail are effective after the expiration of an excessively short period of time (e.g., two weeks), even if the consumer did not consult them.<sup>348</sup>

This list of invalidated terms includes many of the standard terms incorporated in U.S. style terms of service, clickwrap, and browsewrap agreements. On September 15, 2005, the *Cour d'Appel* of Versailles affirmed the decision of the lower court on all counts find AOL France's TOU to be unfair.<sup>349</sup> The court's decision confirms the notion that French courts do not endorse these one-sided clauses routinely upheld in U.S. courts. There is little doubt that U.S. courts would enforce the same clauses struck down by the French court in the AOL case.<sup>350</sup> Courts and

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347. Bradley Joslove & Andréi Krylov, *Standard American Business to Consumer Terms and Conditions in the EU*, 18 MICH. INT'L L. 1, 2–3 (2005).

348. *Id.* at 2.

349. R.G. N [degree] 04/05564, J.C.P. IV 150905, Cour d'Appel [CA] [regional court of appeal] Versailles, 1e ch. (Sept. 15, 2005), available at <http://www.clauses-abusives.fr/juris/cav150905.pdf>.

350. Jane K. Winn & Mark Webber, *The Impact of EU Unfair Contract Terms Law on*

consumer agencies in other European countries would likely adopt the French courts' sceptical attitude to U.S.-style TOUs. The common denominator of European case law is the existence of unwaivable mandatory terms protecting consumers. U.S. software companies cannot side step the more restrictive mandatory consumer rules by the simple expedient of parties' choice of law or exclusive jurisdiction clauses.<sup>351</sup> Software publishers routinely include one-sided forum selection clauses in their consumer TOUs.<sup>352</sup> U.S.-style social networking sites also require consumers to submit to litigation (or arbitration) in potentially distant forums.<sup>353</sup> Social networking sites that require pre-dispute mandatory arbitration for all disputes create absolute immunity because they know that consumers will not be able to exercise this impractical dispute resolution method.

The United Kingdom, which shares a common law tradition with the United States, has implemented radically different consumer rules. The UK consumer protection agencies police TOUs in the consumer marketplace. In July of 2006, the UK's Office of Fair Trading ("OFT") investigated Dell's TOUs.<sup>354</sup> In the aftermath of the OFT investigation, Dell acceded to changing its online terms and conditions to make them more fair to UK consumers. Dell struck a number of anti-consumer provisions, such as provisions that limited liability for negligence to the price of the product, exclusions of liability for consequential damages or

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*U.S. Business-to-Consumer Internet Merchants*, 62 BUS. LAW. 209, 225 (2006); Winn & Bix, *supra* note 213, at 183 (2006).

351. *B2C in Europe and Avoiding Contractual Liability*, *supra* note 279; OAKLEY, *supra* note 210, at 1067 (asserting that "the Directive also specifically provides that consumers in member states should not lose the protection of the Directive by virtue of a choice-of-law provision in a non-member country").

352. *See, e.g.*, *Guadagno v. E\*Trade Bank*, 592 F. Supp. 2d 1263, 1271–72 (C.D. Cal. 2008) (upholding a forum selection clause requiring users to waive their right to joining class action and submitting to pre-dispute mandatory arbitration); *Eslworldwide.com, Inc. v. Interland, Inc.*, No. 06 CV 2503, 2006 WL 1716881, at \*2 (S.D.N.Y. June 21, 2006) (upholding forum selection clause including in clickwrap agreement); *Siebert v. Amateur Athletic Union of U.S., Inc.*, 422 F. Supp. 2d 1033, 1039 (D. Minn. 2006) (upholding forum selection clause for pre-dispute mandatory arbitration); *Adsit Co., Inc. v. Gustin*, 874 N.E.2d 1018, 1024 (Ind. Ct. App. 2007) (upholding Adsit's *Terms of Use* agreement containing a forum selection clause and choice of law clause where user was required to click on a button reading "I Accept" that was placed strategically at the bottom of the webpage containing the policy; clickwrap agreement also was displayed on an internet webpage). *See generally* Rustad & Koenig, *supra* note 99, at 1564 (describing the widespread software industry practice of drafting TOUs with oppressive provisions that deprive consumers of any meaningful remedy).

353. *See, e.g.*, *Miller v. Facebook, Inc.*, No. C 10-00264 WHA, 2010 WL 1292708, at \*2 (N.D. Cal. Mar. 31, 2010) (enforcing Facebook's choice of forum clause in secondary copyright infringement case).

354. Press Release, Office of Fair Trading, Dell to Improve Terms and Conditions for Consumers (July 6, 2006), <http://www.oft.gov.uk/news-and-updates/press/2006/111-06>.

compensation clauses, exclusions of liability for oral representations made by sales representatives not confirmed in writing, and the requirement that consumers notify Dell of any errors in its confirmation of the consumer's order immediately.<sup>355</sup>

Ofcom, which is an independent regulator for the UK telecommunications industry, struck down objectionable UK Online terms of use when ruling that UK Online's small print terms were potentially unfair to consumers.<sup>356</sup> The OFT had:

warned e-tailers before against telling consumers to tick a box saying 'I have read and understood the terms and conditions.' [And the OFT requested that e-tailers] ask [the consumer] to check a box indicating that they accept the terms and conditions . . . and highlight the importance of reading them.<sup>357</sup>

In June of 2010, Ofcom negotiated with UK's three largest landline providers (BT, TalkTalk, and Virgin Media) to ensure that consumers were not assessed early termination charges.<sup>358</sup> Ofcom's investigation of UK Online resulted in an amendment by UK Online to its standard consumer contracts, limiting the liability for substandard service.<sup>359</sup> UK Online agreed to remove specific clauses purported to "eliminate liability for delay in providing its service" and to "exclude liability for indirect, special or consequential losses, loss of profits, business interruption and loss of data, losses caused by any virus, denial of service, spamming or hacking [that] was deemed potentially unfair."<sup>360</sup> Ofcom also concluded that it was unacceptable to force consumers to indemnify UK Online against all claims, liability, damages, costs, and expenses, including legal fees arising out of the non-compliant TOU provisions.<sup>361</sup>

In the wake of the Ofcom investigation, UK Online amended a clause providing a penalty for late payment; a daily interest charge on late payments, originally set at four percent above the base lending rate of Barclays Bank, was reduced by three percent for being disproportionately high.<sup>362</sup> Moreover, UK Online also amended a clause, which enabled UK Online to modify their terms of use at any time by merely emailing changes to consumers.<sup>363</sup> This clause did not give consumers a right to terminate if

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355. *Id.*

356. *Ofcom's Plain English Police Target UK Online*, OUT-LAW.COM (May 11, 2006), <http://www.out-law.com/page-6910>.

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

the changes were to their disadvantage.<sup>364</sup> Ofcom required UK Online to give consumers a right to cancel the contract if UK Online's unilateral modifications were unacceptable to them.<sup>365</sup> Ofcom is able to force providers like UK Online to modify their TOUs because the provider has obligations to conform their agreements to the UK's Unfair Terms in Consumer Contracts Regulations of 1999.<sup>366</sup>

The mandatory consumer rules apply only to business-to-consumer terms of use, social licenses, and other TOUs that are not business-to-business (B2B) contracts. Nevertheless, business customers also have rights under the UK's Unfair Contract Terms Act 1977 (UCTA). The UCTA places a number of restrictions on the contract terms that can be incorporated in B2B contracts, as illustrated by *Kingsway Hall Hotel Ltd. v. Red Sky IT (Hounslow) Ltd.*<sup>367</sup> In *Kingsway*, the High Court found that provisions excluding a software vendor's liability for implied warranties pertaining to quality and fitness purposes were unreasonable under the UCTA. If the UK courts are willing to invalidate a B2B licensing agreement, they will be even more vigilant in protecting consumers against unfair or deceptive U.S.-style TOUs.

*B. Second Point: American TOUs That Waive Consumer Rights*

In the United States, TOUs permit consumers to waive protection in their own jurisdiction.<sup>368</sup> A pro-consumer approach should entitle consumers to access all remedies. In Europe, a supplier/seller cannot circumvent mandatory consumer rules by virtue of oppressive choice of law. Otherwise, the consumer legislation would disregard the private autonomy of parties. This is true with the exception of situations where the chosen law offers the same guarantees and protections offered by the national law of the consumer's home country. There is compelling empirical evidence for the proposition that U.S.-style TOUs are worse than existing law, such as article 2 of the UCC. In Professor Marotta-Wurgler's study of TOUs, she found that ninety percent of her sample TOUs

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364. *Id.*

365. *Id.*

366. This was UK's statutory enactment of the Unfair Contract Terms Directive mandated by the European Union.

367. *Kingsway Hall Hotel Ltd. v. Red Sky IT (Hounslow) Ltd.*, 2010 EWHC 965 (TCC) (Eng.).

368. See, e.g., *Fteja v. Facebook, Inc.*, 11 Civ. 918 (RJH), 2012 U.S. Dist. LEXIS 12991, at \*40 (S.D.N.Y., Jan. 24, 2012) (ordering Facebook's motion to transfer action and enforcing choice of forum clause). See generally *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (enforcing choice of forum clause outside consumer's home court); see also *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (forum selection clauses "are prima facie valid and should be enforced . . .").



disclaimed warranties, while another eighty-nine percent eliminated all consequential damages.<sup>369</sup> She concluded that while the terms contained in TOUs vary across software markets, licensors provide fewer rights than consumers would expect under UCC article 2.<sup>370</sup> Throughout Europe (and the rest of the world), statutes prohibit the wholesale waiver of rights.

The defenders of the market-based approach might ask why one-sided agreements cannot be challenged on unconscionability grounds. Indeed, pursuant to UCC article 2, consumers have a right to challenge any contract on unconscionability grounds.<sup>371</sup> In fact, plaintiffs have had some success challenging oppressive contracts employing the UCC's doctrine of unconscionability.<sup>372</sup> However, to prevail in such an action, courts require a finding of both procedural and substantive unconscionability.<sup>373</sup> Procedural unconscionability requires an unfair bargaining process ("bargaining naughtiness"), whereas substantive unconscionability pertains to overly harsh terms.<sup>374</sup> The procedural issue is often relevant in TOUs where the location of the terms of use on a website may include a flawed contract formation process.

A court reviewing a TOU for unconscionability may refuse to enforce the agreement in its entirety, invalidate the unconscionable provision, or "limit the application of any unconscionable term as to avoid any unconscionable result."<sup>375</sup> The fact that a consumer has less bargaining power than a software vendor is not outcome determinative because the

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369. Marotta-Wurgler, *supra* note 52, at 703.

370. *Id.* at 713.

371. U.C.C. § 2-302 (2004).

372. *See, e.g.,* Riensche v. Cingular Wireless, L.L.C., No. C06-1325Z, 2006 WL 3827477, at \*9 (W.D. Wash. Dec. 27, 2006) (holding that the forum selection clause was substantively unconscionable); *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1173, 1176 (N.D. Cal. 2002) (refusing to enforce pre-dispute mandatory arbitration clause in user agreement ruling that the forum selection clause was substantively and procedurally unconscionable). Additionally, the doctrine of unconscionability has been applied in a wide array of contexts. *See, e.g.,* *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006 (Wash. 2007) (holding a class action waiver unconscionable); *Gatton v. T-Mobile USA*, 61 Cal. Rptr. 3d 344, 358 (Cal. Ct. App. 2007) (holding a class action waiver unconscionable and unenforceable); *Aral v. EarthLink, Inc.*, 36 Cal. Rptr. 3d 229, 238 (Cal. 2005) (holding a class action waiver unconscionable).

373. *See* *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 575 (N.Y. App. Div. 1998) (explaining that New York requires "a showing that a contract is 'both procedurally and substantively unconscionable when made'" (quoting *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10 (1988)). California's test for substantive unconscionability is whether the clause or contract "shock[s] the conscience." *Am. Software, Inc. v. Ali*, 54 Cal. Rptr. 2d 477, 480 (Cal. Ct. App. 1996). The test for procedural unconscionability is whether "the manner in which the contract was negotiated" was unfair. *Id.* at 479.

374. *Maxwell v. Fidelity Fin. Servs., Inc.*, 907 P.2d 51, 58 (1995) (quoting Arthur Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967)).

375. U.C.C. § 2-302(1) (2004).

purpose of the unconscionability doctrine is to prevent “oppression and unfair surprise,” not to rectify bargaining power imbalances.<sup>376</sup> With the exception of instances in which the seller creates outrageous terms, UCC article 2 unconscionability is often asserted, but seldom successfully deployed to strike down one-sided clauses. The doctrine of unconscionability applies most often in fact patterns where the customer has little knowledge about a complex computer system and the licensor lulls the inexperienced person into complacency on the basis that their software is adequate for the task.<sup>377</sup> In one such instance, CompuServe was assessed a fine of up to €250,000 and a contempt of court judgment against the CEO if the provider should continue to incorporate unfair terms in its agreements.<sup>378</sup>

The European Commission (EC) has targeted U.S. software companies in recent years for anticompetitive practices. In May 2008, the EC fined Intel \$1.06 billion.<sup>379</sup> Microsoft Corporation paid a \$12 million fine imposed by the German Government for violating Germany’s anti-competition law.<sup>380</sup> On March 24, 2004, the EC held that Microsoft had abused its dominant position under Article 82 of the European Community Treaty by refusing to supply and to authorize the use of interoperable information to the producers of competing operating systems<sup>381</sup> and by tying together the Windows client PC operating system and the Windows Media Player.<sup>382</sup> The EC imposed a fine of €497 million on Microsoft,<sup>383</sup>

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376. U.C.C. § 2-302 cmt. 1 (2004) (stating that the test is one of evaluating one-sidedness under the circumstances prevailing at the making of the contract to prevent “oppression and unfair surprise”).

377. MICHAEL D. SCOTT, SCOTT ON INFO. TECH. L., § 7.11 at 7-41 to -42 (summarizing license agreements provisions on warranty disclaimers that were unconscionable).

378. Maxeiner, *supra* note 282 at 164.

379.

The European Commission has imposed a fine of €1 060 000 000 on Intel Corporation for violating EC Treaty antitrust rules on the abuse of a dominant market position (article 82) by engaging in illegal anticompetitive practices to exclude competitors from the market for computer chips called x86 central processing units (CPUs). The Commission has also ordered Intel to cease the illegal practices immediately to the extent that they are still ongoing. Throughout the period October 2002–December 2007, Intel had a dominant position in the worldwide x86 CPU market[.]

Press Release, Europa, Antitrust: Commission Imposes Fine of €1.06 bn on Intel for Abuse of Dominant Position; Orders Intel to Cease Illegal Practices (May 13, 2005), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/745>.

380. Kurt Mackie, *Microsoft to Appeal Uniloc Case, Pay Other Fines*, MICROSOFT CERTIFIED PROF’L MAGAZINE (Apr. 9, 2009), <http://mcpmag.com/articles/2009/04/09/microsoft-to-appeal-uniloc-case-pay-other-fines.aspx>.

381. Comm’n Decision, Case COMP C-3/37.792, at 779–91 (Mar. 24, 2004).

382. *Id.* at 792–989.

383. *Id.* at 1080.

further ordering it to make available the interoperability information<sup>384</sup> and to allow its use on reasonable and non-discriminatory terms.<sup>385</sup>

The EC also ordered Microsoft to market a version of the Windows client PC operating system without the Windows Media Player and to refrain from using any technological, commercial, contractual, or any other means which would have the equivalent effect of tying Windows Media Player to Windows.<sup>386</sup> Microsoft appealed this judgment before the EU Court of First Instance (CFI), but the CFI upheld the EC's decision in its principal points.<sup>387</sup> On October 22, 2007, about a month after the decision of the Court of First Instance, Microsoft reached an agreement with the European authorities granting access to its communications protocol for a one-time fee of €10,000.<sup>388</sup> But Microsoft classified these protocols as trade secrets, not patents. If competitors want more information than those trade secrets, they must license Microsoft's patents, paying a royalty of 0.4 percent of the competing product's sales. Microsoft had originally demanded 5.95 percent of sales as royalties.<sup>389</sup>

The EC required Microsoft Corporation to change its licensing practices in Europe.<sup>390</sup> Microsoft now uses a ballot approach, giving consumers a choice of browsers in a neutral window rather than in an Internet Explorer window.<sup>391</sup> Microsoft also added an "E" to the title to identify the European version of Windows 7 and advised original equipment manufacturers that they could install a browser of their choice so users could begin to surf the Web immediately after purchase.<sup>392</sup> The

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384. *Id.* at 899–1004.

385. *Id.* at 1005–09.

386. *Id.* at 1011–14.

387. Case T-201/04, *Microsoft v. Comm'n*, 2007 E.C.R. 00000, available at <http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79929082T19040201&doc=T&ouvert=T&seance=ARRET>.

388. William H. Page & Seldon J. Childers, *Bargaining in the Shadow of the European Microsoft Decision: The Microsoft-Samba Protocol License*, 102 NW. U. L. REV. COLLOQUY 332 (2008).

389.

On October 22, 2007, about a month after the decision of the Court of First Instance, the EC's antitrust commissioner, Neelie Kroes reached an agreement with Microsoft's CEO Steve Ballmer that would require Microsoft to license its intellectual property, other than patents, for a nominal one-time fee of [euro] 10,000, and its patents for modest per-unit royalties.

*Id.* at 343 (2008).

390. *Id.* at 343–44 (noting that the European authorities required Microsoft to change its licensing practices particular as to open source licenses).

391. Lance Whitney, *EU Resolves Microsoft IE Antitrust Case*, CNET.COM (Dec. 16, 2009, 5:28 AM), [http://news.cnet.com/8301-10805\\_3-10416402-75.html](http://news.cnet.com/8301-10805_3-10416402-75.html).

392. Britta Wuelfing, *Competition Laws: Microsoft 7 Without IE in Europe*, LINUXPRO MAG. (June 15, 2009), <http://www.linux-magazine.com/Online/News/Competition-Laws-Microsoft-7-without-IE-in-Europe>.

European approach to consumer protection is predicated upon mandatory terms, while the American approach is premised on allowing the free market to prevail with limited policing of contracts.

*C. Third Point: “Terms Now, Pay Later” or Rolling Contracts*

Rolling contracts are increasingly used in internet-related TOUs. Skype reserves the right to modify its TOUs at any time by publishing the revised Terms of Use on its Website.<sup>393</sup> MyLife, a social networking site, reserves the right to modify and amend terms of use from time to time, for any reason, and without prior notice; use of the website indicates the user’s approval or acceptance of any changes.<sup>394</sup> LinkedIn, the world’s largest network for professionals,<sup>395</sup> also claims that it can unilaterally modify its terms of use from time to time.<sup>396</sup> Microsoft’s Windows Live social network site also asserts its right to modify its terms of use:

If we amend the contract, then we’ll notify you before the change takes effect. We may give this notice by posting it on the service or by any other reasonable means. If you don’t agree to the change, we’re not obligated to keep providing the service, and you must cancel and stop using the service before the change becomes effective. Otherwise, the new terms will apply to you.<sup>397</sup>

Skype maintains that a consumer’s continued use of its products after changes to the terms are published constitute acceptance to be bound by the

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393. *Terms of Use*, SKYPE, <http://www.skype.com/intl/en-us/legal/terms/voip/> (last updated May 2012).

394. *See, e.g., User Agreement*, MYLIFE.COM (Dec. 28, 2011), <http://www.mylife.com/UserAgreement.pub> (asserting right to update terms and that continued use of the service signifies the user’s acceptance of the new terms and conditions); *see also, Terms of Service*, TAGGED (Sept. 30, 2011), [http://www.tagged.com/terms\\_of\\_service.html](http://www.tagged.com/terms_of_service.html) (reserving “the right to modify or amend this Agreement at any time, for any reason, or for no reason at all, at Tagged’s sole discretion”).

395. LinkedIn is today’s fastest growing recruiting company. For the first time ever, employees can maintain their own resumes for recruiters to search in real time, giving LinkedIn the opportunity to eat the lucrative \$400 billion recruiting industry. Marc Andreessen, *Why Software is Eating the World*, WALL ST. J. ESSAY (Aug. 20, 2011), <http://online.wsj.com/article/SB10001424053111903480904576512250915629460.html> (last visited Oct. 19, 2011).

396. LinkedIn’s *Terms of Use* states: “You must comply with all applicable laws, the Agreement, as may be amended from time to time with or without advance notice . . . .” *User Agreement*, LINKEDIN.COM, [http://www.linkedin.com/static?key=user\\_agreement](http://www.linkedin.com/static?key=user_agreement) (last updated June 16, 2011).

397. Microsoft Corp., *Microsoft Service Agreement for WindowsLive* ¶ 8, available at <http://explore.live.com/microsoft-service-agreement?mkt=en-us> (last updated Aug. 31, 2011).

terms and conditions of the revised version of the Terms of Use.<sup>398</sup> The “rolling contract” that gives the licensor the right to modify contract terms at will is a growing trend.<sup>399</sup>

The Federal Trade Commission’s Bureau of Consumer Protection expressed concern that the UCITA departed from traditional consumer protection by approving consumer software licenses that did not comply with the FTC’s rules on presale disclosure of material terms.<sup>400</sup> UCITA validates rolling contracts if the user had reason to know that terms would come later, had a right to a refund if the terms were declined, and manifests assent after an opportunity to review the terms.<sup>401</sup> “UCITA does not require that licensees be informed of licensing restrictions in a clear and conspicuous manner prior to the consummation of the transaction.”<sup>402</sup> Rolling contracts are challengeable by the European consumer protection agency, which is responsible for policing unfair or deceptive trade practices. The Norwegian Consumer Agency challenged iTunes’ terms of use on the basis that it was structured as a rolling contract.

The typical U.S.-style TOUs disclaim all express and implied warranties, including fitness for a particular purpose and non-infringement of third party rights. Content creators often offer their products on an “as is” or “without any warranties of any kind” basis, which do not even

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398. *Id.*

399. Peter Laird, *The Good, The Bad and the Ugly of SaaS Terms of Service, Licenses, and Contracts*, LAIRD ON DEMAND BLOG (June 12, 2008) <http://peterlaird.blogspot.com/2008/06/good-bad-and-ugly-of-saas-terms-of.html> (“Box.net, Coghead, Concur, Salesforce, Taleo, Zoho: these companies have contracts that can change at any time without any notice.”).

400.

Unlike the law governing sales of goods, UCITA departs from an important principle of consumer protection that material terms must be disclosed prior to the consummation of the transaction. UCITA does not require that licensees be informed of licensing restrictions in a clear and conspicuous manner prior to the consummation of the transaction. For example, UCITA allows licensors of software to disclose these restrictions after the transaction has been completed, such as when the licensee opens the software box and discovers the terms of the license. Thus, in effect there may be no “meeting of the minds” prior to the consummation of the transaction. Moreover, UCITA adopts a definition of the term “conspicuous” that has the effect of allowing material license terms not to be disclosed clearly and conspicuously at any point before or after the transaction is completed.

Letter of Fed. Trade Comm’n’s Bureaus of Consumer Prot. and Competition and of the Policy Planning Office to John L. McClaugherty, Chair, Exec. Comm., Nat’l Conference of Comm’rs on Unif. State Laws (July 9, 2009), *available at* <http://www.ftc.gov/be/v990010.shtm> (last visited Feb. 20, 2012).

401. Nimmer, *supra* note 264 at § 11:147 (2009).

402. Letter from the Fed. Trade Comm’n to John L. McClaugherty, Exec. Comm. Chair, Nat’l Conference of Comm’rs on Unif. State Laws (July 9, 1999) *available at* <http://www.ftc.gov/be/v990010.shtm>.

warrant functionality of the platform. A Norwegian consumer action against iTunes' one-sided TOUs illustrates the sharp divide between U.S. and European consumer protection. iTunes enables online customers to download either complete albums or individual songs from artists all over the world. Although Norway is just a European Economic Area (EEA) member, its copyright and consumer protection law fully complies with the EC Copyright and the Uniform Contract Terms Directive.<sup>403</sup> The Norwegian ombudsman found a large number of problematic terms, including the provider's full disclaimer of liability for every kind of loss of data, corruption, attack, virus, interference, hacking, or other security intrusions.<sup>404</sup>

On January 25, 2006, the Norwegian Consumer Council presented a complaint with the Consumer Ombudsman against iTunes for violation of fundamental consumer rights. Norwegian Consumer Ombudsman Bjørn Erik Thon ruled that iTunes violated Norwegian consumer law. In particular, Mr. Thon considered a number of iTunes' clauses unreasonable violations of Section 9(a) of the Norwegian Marketing Control Act. The Norwegian Ombudsman also found iTunes' assertion of the right to unilaterally modify terms of condition or add new rules, policies, terms, or conditions on uses as questionable.<sup>405</sup>

The Swedish Consumer Council has filed a similar complaint referring to relevant passages in the Swedish Consumers Act.<sup>406</sup> Apple/iTunes replied to the Norwegian complaint and proposed revisions of some of its contract terms.<sup>407</sup> There is little doubt that the activism of consumer agencies or Ombudsmen is a fundamental step towards an effective protection for consumers in Europe.

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403. Lucchi, *supra* note 287, at 95.

The Agreement creating the European Economic Area (EEA) entered into force on 1 January 1994. It allows the EEA EFTA States (Norway, Iceland and Liechtenstein) to participate in the Internal Market on the basis of their application of Internal Market relevant acquis. All new relevant Community legislation is dynamically incorporated into the Agreement and thus applies throughout the EEA, ensuring the homogeneity of the internal market.

*European Economic Area*, EUROPEAN UNION: EXTERNAL ACTION, <http://eeas.europa.eu/eea/> (last visited June 10, 2012).

404. For a list of iTunes' questionable terms and conditions, see *iTunes' Questionable Terms and Conditions*, FORBRUKERRÅDET (Jan. 25, 2006, 3:03 PM), <http://forbrukerportalen.no/Artikler/2006/1138119849.71>.

405. *Id.*

406. *Norway, Sweden, Denmark May Fine Apple Over iTunes*, OUT-LAW.COM (June 8, 2006), <http://www.out-law.com/page-6990> [hereinafter *Norway*].

407. Henrik Nilsson & Jill Hagberg, *iTunes Terms Service Scrutiny Nordic Consumer Ombudsmen*, TWOBIRDS.COM, [http://www.twobirds.com/German/News/Articles/Seiten/iTunes\\_Terms\\_Service\\_scrutiny\\_Nordic\\_Consumer\\_Ombudsmen.aspx](http://www.twobirds.com/German/News/Articles/Seiten/iTunes_Terms_Service_scrutiny_Nordic_Consumer_Ombudsmen.aspx) (last visited June 10, 2012).

It is not unreasonable to assume that Norway will refuse enforce U.S.-style TOUs. In the United States, software companies use choice of jurisdiction and choice of law clauses to divest consumers of their home court consumer protection. In Europe, choice of law rules favoring consumers are mandatory, non-waivable provisions and, therefore, a U.S. software company cannot use contractual terms to divest consumers of mandatory Norwegian consumer protection. In the iTunes case, a consumer could theoretically be required to litigate a claim in Luxembourg according to English law if the iTunes contract is enforceable. The Ombudsman ruled that, because iTunes-Norway targets Norwegian consumers in its iTunes-Norway website, the consumer's case should be decided under Norwegian law, not English law.<sup>408</sup> Moreover, the website's domain name and language are Norwegian, and prices are stated in Norwegian kroner. Apple/iTunes also had actions pending by the Swedish Consumer Counsel who objected to the contracting practice of reserving "the right at any time to amend the terms of an agreement."<sup>409</sup>

The legal advisor for the Swedish Consumer Council contended that rolling contracts would not be enforceable in a "Swedish court in a business to consumer relationship."<sup>410</sup> If U.S. software publishers wish to do business in the Eurozone, they will need to localize their TOUs to comply with European Union directives on unfair contract terms, jurisdiction and the enforcement of judgments, choice of law, and other mandatory rules.<sup>411</sup>

The Swedish ombudsman objected to an iTunes rolling contract provision, which allowed iTunes to amend their contract unilaterally.<sup>412</sup> Norway, Sweden, and Denmark all planned to issue rulings on the iTunes

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408. "According to the ruling, iTunes breaks section 9a of the Norwegian Marketing Control Act. The regulator said it was not reasonable that the consumer must sign up to a contract regulated by English law, rather than Norwegian law." John Oates, *iTunes Guilty of Breaking Norwegian Law*, THE REGISTER (June 7, 2006, 2:29 PM), [http://www.theregister.co.uk/2006/06/07/norway\\_rules\\_itunes\\_unfair/](http://www.theregister.co.uk/2006/06/07/norway_rules_itunes_unfair/).

409. *Norway*, *supra* note 406.

410. *Id.*

411. See Rustad & Koenig, *supra* note 212, at 47–49 (comparing U.S. and European contract, tort, and regulations governing software and Internet-related technologies).

412. "The contracts, like [A]nglo-[A]merican contracts, keep the right at any time to amend the terms of an agreement," said Jonas Adols, legal advisor to the Swedish Consumer Council. "In my eyes that includes everything including price. You would never get away with that before a Swedish court in a business to consumer relationship." *Norway*, *supra* note 406. The Norwegian consumer advocate also objected to iTunes' full disclaimers of liability for loss of data, *corruption*, *attack*, *viruses*, *interference*, *hacking*, or *other security intrusions*. *Id.* On January 25, 2006, the Norwegian Consumer Council filed a complaint with the Consumer Ombudsman against iTunes for violating fundamental consumer rights. Norwegian Consumer Ombudsman Bjørn Erik Thon contended that some of iTunes *Terms of Use* were unreasonable, violating section 9a of the Norwegian Marketing Control Act. *Id.*

terms of service.<sup>413</sup> In Europe, the stronger contracting party does not have unfettered discretion to change the terms and post the revisions on a website. Article 7 of the Unfair Contract Terms Directive provides that “Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.”<sup>414</sup> Article 7 gives European courts a powerful tool to invalidate rolling contracts.

Few cases illustrate the chasm between the U.S. and European approaches to TOUs better than recent Italian cases interpreting Europe-wide directives. A recent test of European norms arose out of a consumer transaction in Firenze, Italy, after a consumer bought a notebook computer with pre-installed Microsoft software (Window XP and Works 8).<sup>415</sup> The consumer, Mr. Pieraccioli, did not wish to use the Windows-based operating system on his computer and offered to return the software and requested a refund.<sup>416</sup> The seller, Hewlett Packard Italia, refused to give a refund on the grounds that the software was inseparable from the hardware.<sup>417</sup>

In the Italian case, the consumer had no access to the terms of software license agreement prior to purchasing the hardware.<sup>418</sup> The court determined that a European consumer had a right to reject the terms of the software license agreement and to return the software for a full refund of the value of the Microsoft product.<sup>419</sup> Microsoft’s TOU that accompanied the software gave the consumer the right to contact the producer of the hardware and request information in order to return the software and obtain the refund.<sup>420</sup> The court reasoned that a computer without software is obviously less valuable and the consumer was due a refund.<sup>421</sup> The court entered judgment in favor of the consumer for €140.00 in addition to the legal costs.

On July 28, 2010, the Tribunal from Firenze affirmed the decision of the Justice of Peace.<sup>422</sup> The Tribunal pointed out that the hardware and the

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413. *Id.*

414. Council Directive 93/13, *supra* note 269, at art. 7.

415. *Giudice di Pace di Firenze-Sentenza n. 5834/2007*, available at [http://www.interlex.it/testi/giurisprudenza/fi07\\_5384.htm](http://www.interlex.it/testi/giurisprudenza/fi07_5384.htm) (last visited June 10, 2012).

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.*

422. Tribunale di Firenze, 28 luglio 2010, n. 19651-2007 (It.), available at [http://www.aduc.it/generale/files/file/allegati/Sentenza\\_appello\\_HP.pdf](http://www.aduc.it/generale/files/file/allegati/Sentenza_appello_HP.pdf). For a comment on the case, see Annamaria Fasulo, *Software Windows preinstallato sul PC. Corte Appello conferma motivazioni Aduc per il rimborso: Analisi [Windows software is preinstalled on*



software are technically separate products governed by different legal rules.<sup>423</sup> The Tribunal clarified that the hardware contract is a sale agreement while the software is licensed.<sup>424</sup> The Tribunal stated that the licensee must actually accept a license agreement for it to be enforceable.<sup>425</sup> In this case, Pieraccioli had no ability to accept the terms of the license agreement until after he purchased the hardware, accessed the computer, and reviewed the terms.<sup>426</sup> The court reasoned that if the consumer refuses the terms, he has the right to obtain the refund of the money associated with the software's costs if he returns the software.<sup>427</sup> The court rejected the argument presented by HP Italia that the consumer was able to buy hardware without the pre-installed software somewhere else. The judge ruled that the consumer is free to buy a computer along with Original Equipment Manufacturer (OEM) software, even if the market offers computers without OEM software.<sup>428</sup> This choice does not impair the consumer's right to a refund in the event he does not agree to the terms and conditions of the software agreement.

In the aftermath of this case, an Italian consumer association filed a class action against Microsoft to obtain reimbursement of license costs for consumers who return the preloaded Microsoft operating system.<sup>429</sup> Free Software Foundation Europe (FSFE) welcomes this initiative because a higher degree of transparency and the establishment of a clear reimbursement mechanism are necessary steps to create free competition in the operating system market that provides consumers real choices.<sup>430</sup> In Europe, software publishers, websites, and networking sites must give customers full disclosure and an opportunity to accept the agreement.<sup>431</sup> In

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*your PC. Appeals Court confirms Aduc reasons for the refund: Analysis*], ADUC (Sept. 15, 2010, 8:58 AM), [http://www.aduc.it/articolo/software+windows+preinstallato+sul+pc+corte+appello\\_18122.php](http://www.aduc.it/articolo/software+windows+preinstallato+sul+pc+corte+appello_18122.php).

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. *See Class Action contro Microsoft: L'Adesione della Free Software Europe*, ADUC [Ass'n for the Rights of Users and Consumers] (Mar. 21, 2011, 12:46 PM), [http://www.aduc.it/comunicato/class+action+contro+microsoft+adesione+della+free\\_18876.php](http://www.aduc.it/comunicato/class+action+contro+microsoft+adesione+della+free_18876.php) (last visited Feb. 4, 2012).

430. *See FSFE Welcomes ADUC's Class Action Against Microsoft*, FSFE, <http://fsfe.org/news/2011/news-20110321-01.en.html> (last visited June 10, 2012).

431. "The European Union's Unfair Contract Directive gives, in effect, all European consumers a fundamental right to read, review, and understand standard terms before concluding a contract. The Directive is viewed by the Commission as the chief tool to achieve a fair result and to prevent unfair surprise and oppression." Rustad & Onufrio, *supra* note 9, at 65 (discussing Council Directive on Unfair Terms in Consumer Contracts (93/13/EEC) (Apr. 5, 1993)).

Italy, an obligation of full disclosure and an opportunity to accept the agreement applies to business-to-business agreements<sup>432</sup> as well as business-to-consumer transactions.<sup>433</sup>

An example of how this provision of Italian contracting law works arose out of software licensing case in a small town in Southern Italy.<sup>434</sup> The plaintiff, a small company, purchased a personal computer and other hardware components on the Internet.<sup>435</sup> The buyer, Cartotecnica Tigri di T.G. (Crt. T.), assented to a clickwrap agreement and then paid by submitting credit card information on the seller's website, E. S.p.a.<sup>436</sup> When the computer never arrived, the buyer filed a breach of contract suit against the Northern Italian seller.<sup>437</sup> The seller moved to compel a forum selection clause, which required that "all disputes relating to this Agreement shall be subjected to the decision of the Tribunal of Monza."<sup>438</sup> As a preliminary matter, the judge in *Partanna* held that the business-to-business clickwrap license agreement could be enforceable.<sup>439</sup> The Italian Civil Code requires that a consumer-buyer demonstrate double approval for seller-oriented clauses such as forum selection clauses.<sup>440</sup>

Article 1340 of the Italian Civil Code requires that a buyer double sign an abusive contract, otherwise the contract is unenforceable.<sup>441</sup> The double signature can be executed on the internet through a digital signature or through a double click.<sup>442</sup> The first click is necessary to approve the

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432. Art. 1341 of the Italian Civil Code provides that general contractual terms and conditions drafted by one of the parties are effective against the other party if the latter, at the time of the agreement, was aware of them or should have been aware of them by using ordinary care. Moreover, the article's second paragraph provides that certain types of clauses, which are considered—in light of their nature—particularly burdensome for the contracting party, must be accepted by way of a specific acceptance in order to be effective. Such specific acceptance, in a traditional paperwork context, is usually made by way of an additional signature by the contracting party, placed at the bottom of the contract below the first signature. See GIACOMO PARMIGIANI & FEDERICA BOCCI, BENCHMARKING OF EXISTING NATIONAL LEGAL E-BUSINESS PRACTICES, DG ENTR/04/68: Country Report—Italy (Sept. 19, 2006).

433. However, even if a consumer is aware of an unfair contractual term in a standard contract and nevertheless signs the contract by way of a specific acceptance, this term can be regarded as void and the nullity of such term may be ascertained directly by the courts. See Giuseppe Cassano, *Contratto via Internet e Tutela della Parte Debole: Commento a GdP Partanna n. 15/2002* (Jan. 2, 2002).

434. *Giudice di Pace di Partanna*, 12 Novembre 2001, available at <http://www.ricercagiuridica.com/sentenze/index.php?num=868> (last visited June 10, 2012).

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

contractual regulation, while the second click is necessary to approve clauses favoring the seller.<sup>443</sup> This case was controversial in Italy, and some commentators pointed out that a double click alone is insufficient to make a clickwrap agreement enforceable.<sup>444</sup> According to the Decreto Legislativo 23 gennaio 2002,<sup>445</sup> the instrument necessary to validate an online contract is the digital signature. Italian companies are not generally equipped to offer this option on the internet. As a result, the only way the seller can obtain the buyer's double signature is by sending a hard copy of the contract via mail to the buyer. The same problem arises with regard to shrinkwrap licenses, which are also considered unenforceable by Italian courts.<sup>446</sup> In fact, even when a buyer is aware of the license terms (they are printed on the outside of the box), he is not able to double sign the license contract and give assent to the abusive clauses.

Some software vendors attempt to circumvent this requirement by requiring buyers to double sign an application for warranties. However, article 1340 of the Italian Civil Code applies only to business-to-business license agreement. In consumer transactions, the Italian Consumer Code applies rather than the Italian Civil Code. The Italian Civil Code implements the Directive 93/13/EC, which considers abusive clauses unenforceable.

*D. Fourth Point: What's Wrong With Mandatory Arbitration in B2C Transactions*

One-sided arbitration clauses have a chilling effect on a consumer's ability to file lawsuits against information-based platforms. Pre-dispute mandatory arbitration eliminates the possibility that consumers have a

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443. *Id.*

444. Professor Cassano contends that the double click is not enough to bind a party to unfair contract terms, but would be enough to hold a party pre-contractually liable if he refused to sign the abusive clauses reproduced in the hard copy of the contract. Cassano explains that when a party manifests his assent to the license terms by clicking the radio button "I agree," he creates an illusion that the agreement may still be concluded. As a result, if the party fails to double sign the hard copy of the contract and send it back to the seller, he should compensate the seller for any damages caused by reasonable reliance. He concludes that the double click method is insufficient to bind a consumer to unfair contract terms if he does not sign the hard copy. See Giuseppe Cassano, *Condizioni Generali di Contratto e tutela del Consumatore nell'era di Internet*, 1 DIRITTO DELL'INTERNET 5 (2007); Aurelio Gentili, *I Documenti Informatici: Validità ed Efficacia Probatoria*, 3 DIRITTO DELL'INTERNET 297 (2006); Giuseppe Cassano e Iacopo Pietro Cimino, *Contratto Via Internet e Tutela della Parte Debole*, 10 I CONTRATTI 869 (2002). According to the Decreto Legislativo (23 gennaio 2002), the instrument necessary to validate an online contract would be the digital signature.

445. Cassano, *supra* note 433.

446. Giuseppe Cassano, *Condizioni Generali di Contratto e tutela del Consumatore nell'era di Internet*, 1 DIRITTO DELL'INTERNET 5, 14–15 (2007).

meaningful remedy for bad software, the invasion of privacy on social network sites, and other consequential damages. For example, it is prohibitively expensive for a Florida teenager to arbitrate in Los Angeles or Chicago (the forum chosen by Habbo, a website targeting teenagers).<sup>447</sup> Habbo.com's terms of service require a teenager to waive his or her right to judicial remedies, while retaining Habbo.com's right to litigate against the teenager:

You irrevocably waive all rights to seek injunctive or other equitable relief and agree to limit your claims to claims for money damages (if any). You agree that any suit, action or proceeding arising out of or relating to these Terms of Use or any of the transactions contemplated herein or related to the Services or any contests or services thereon (including without limitation, statutory, equitable or tort claims) shall be resolved solely by binding arbitration before a sole arbitrator under the rules and regulations of the American Arbitration Association ("AAA"); provided, however, that notwithstanding the parties' decision to resolve any and all disputes arising under these Terms of Use through arbitration, Sulake may bring an action in any court of applicable jurisdiction to protect its intellectual property rights or to seek to obtain injunctive relief or other equitable from a court to enforce the provisions these Terms of Use or to enforce the decision of the arbitrator. The arbitration will be held in Los Angeles, California or Chicago, Illinois, whichever is closest to your place of residency. The arbitrator shall apply the substantive laws of the State of California, shall issue a written decision, and shall have the power to award any legal remedies consistent with these Terms of Use except for punitive, exemplary or special damages. The parties will split the arbitrator's fee; provided, however, that if any court or arbitrator would find such requirement unconscionable or unenforceable, Sulake will have the option to pay all of such fees and proceed with arbitration. You agree that the provisions in this paragraph will survive any termination of your account(s) or the Services.<sup>448</sup>

Requiring a consumer to file suit in a distant forum functions as an absolute immunity for the social networking site where the cost and inconvenience of filing a lawsuit far exceed what can be recovered if the consumer prevails. The reality is that consumers will be unable to find counsel to represent them if courts enforce mandatory arbitration clauses.<sup>449</sup>

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447. *See Terms and Conditions*, HABBO.COM, <https://help.habbo.com/entries/278067-terms-and-conditions-us> (last visited June 10, 2012) (setting out the governing law and requiring waiver of injunctive relief).

448. *Id.*

449. "More broadly, the difficulty of acquiring counsel to accept such cases with little to

Match.com requires users to submit to consumer arbitration under the American Arbitration Association.<sup>450</sup> Match.com requires users to be responsible for paying their share of the costs of retaining an arbitration and the costs of administrative fees according to the American Arbitration Association's (AAA's) fee schedule for consumer disputes.<sup>451</sup> For claims under \$1000, Match.com pays all fees and users may apply to the AAA for a fee waiver.<sup>452</sup> However, in all cases the users give up their rights to file suit, join class actions, or lodge appeals.<sup>453</sup> Other social networks require consumers to pay administrative fees and their share of the cost of the arbitrator irrespective of the size of the claim. The American Arbitration Association charges consumers two fees: an administrative fee and an arbitration fee.<sup>454</sup> The AAA fees and deposits in pre-dispute mandatory arbitration clauses will often exceed the total damages sought by the individual consumer according to the most recent schedule of fees:

If the consumer's claim or counterclaim does not exceed \$10,000, then the consumer is responsible for one-half the arbitrator's fees up to a maximum of \$125. This deposit is used to pay the arbitrator. It is refunded if not used.

If the consumer's claim or counterclaim is greater than \$10,000, but does not exceed \$75,000, then the consumer is responsible for one-half the arbitrator's fees up to a maximum of \$375. This deposit is used to pay the arbitrator. It is refunded if not used.

If the consumer's claim or counterclaim exceeds \$75,000, or if the consumer's claim or counterclaim is non-monetary, then the consumer must pay an Administrative Fee in accordance with the Commercial Fee Schedule. A portion of this fee is refundable pursuant to the Commercial Fee Schedule. The consumer must also deposit one-half of the arbitrator's compensation. This deposit is used to pay the arbitrator. This deposit is refunded if not used. The arbitrator's compensation rate is set forth on the panel biography provided to the parties before the arbitrator is

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no possibility of financial compensation effectively insulates" the stronger party from liability or damages." Alexander J. Casey, *Arbitration Nation: Wireless Services Providers and Class Action Waivers*, 6 WASH. J. L. & TECH. & ARTS 15, 27 (2010).

450. *Match.Com: Arbitration Procedures*, MATCH.COM, <http://www.match.com/registration/arbitrationProcedures.aspx> (last visited June 10, 2012).

451. *Id.*

452. *Id.*

453. *Match.com Terms of Use Agreement*, MATCH.COM, <http://www.match.com/registration/membagr.aspx> (last visited June 10, 2012).

454. Am. Arb. Ass'n, *Consumer Arbitration Costs*, available at <http://www.adr.org/sp.asp?id=22039> (last visited June 10, 2012) (fees effective Jan. 1, 2010).

appointed.<sup>455</sup>

Geni.com's Terms of Use Agreement, like the agreement for Habbo.com, gives either the social media site or the user the right to settle disputes through arbitration in Los Angeles.<sup>456</sup> Geni.com reserves the social networking site's right to its legal remedies and ability to file for "injunctive relief in a court of competent jurisdiction."<sup>457</sup> Tagged.com requires users to give the social media site notice and to wait thirty days before instituting arbitration.<sup>458</sup> The user also agrees to "attempt in good faith to resolve the dispute" described in the user's notice.<sup>459</sup>

Users may elect to seek arbitration by submitting a check or money order payable to the AAA for the appropriate filing fee.<sup>460</sup> Academia.edu, a social networking site for academics, requires users to submit to the AAA consumer arbitration process in lieu of any legal remedy.<sup>461</sup> Cafemom.com, a social networking site for mothers-to-be, requires all claims to be settled

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455. *Id.*

456. The TOUs for Genic.om includes the following language:

This Agreement and any dispute regarding the Geni Services shall be governed by the laws of the State of California, USA, without regard to conflict of law provisions and you agree to exclusive personal jurisdiction and venue in the state and federal courts of the United States located in the State of California, City of Los Angeles. Either Geni or you may demand that any dispute between Geni and you about or involving the Geni Services must be settled by arbitration utilizing the dispute resolution procedures of the American Arbitration Association (AAA) in Los Angeles, California, USA, provided that the foregoing shall not prevent Geni from seeking injunctive relief in a court of competent jurisdiction.

*Terms of Use*, GENI.COM, [http://www.geni.com/company/terms\\_of\\_use](http://www.geni.com/company/terms_of_use) (last visited Feb. 10, 2012).

457. *Id.*

458. *Terms of Service*, TAGGED.COM, [http://www.tagged.com/terms\\_of\\_service.html](http://www.tagged.com/terms_of_service.html) (last visited Feb. 10, 2012).

459. *Id.*

460. The American Association's current fee is based upon the size of the claim in dispute. The consumer must pay between \$125 and \$375, while the business or social network will pay the rest of the costs of arbitration. Am. Arb. Ass'n, *Consumer Arbitration Costs*, <http://www.adr.org/sp.asp?Id.=22039> (last visited Feb. 10, 2012).

461. The TOUs for Academia.edu include the following language:

If there is any dispute about or involving the Academia.edu Services, you agree that the dispute shall be governed by the laws of the State of Oregon, USA, without regard to conflict of law provisions and you agree to exclusive personal jurisdiction and venue in the state and federal courts of the United States located in the State of California. Either Academia.edu or you may demand that any dispute between Academia.edu and you about or involving the Academia.edu Services must be settled by arbitration utilizing the dispute resolution procedures of the American Arbitration Association (AAA) in Los Angeles, California, USA, provided that the foregoing shall not prevent Academia.edu from seeking injunctive relief in a court of competent jurisdiction.

*Terms of Use*, ACADEMIA.EDU, <http://academia.edu/terms> (last visited June 10, 2012).

by AAA's procedures that require consumers to split the fees and the cost of arbitrators.<sup>462</sup>

Pre-dispute mandatory arbitration clauses are included in terms of service documents because they benefit content creators and effectively operate as an anti-remedy. The legal significance of such a clause is that the consumer forfeits his or her right to have any dispute resolved by a judge or jury. Instead, the agreement mandates that any disputes be resolved exclusively through a private system of binding arbitration (and without the possibility of an appeal). U.S. courts enforce these clauses even if the practical effect is to divest consumers of any meaningful remedy because of the expense or inconvenience to the consumer.<sup>463</sup> Slightly less than 10 percent of terms of service agreements studied by Mann and Siebeneicher contain a pre-dispute mandatory arbitration clause.<sup>464</sup>

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462. The Terms of Service for Cafemom.com include the following language:

These TOS are governed by, and will be interpreted in accordance with, the laws of the State of New York, without regard to any choice of law provisions. You agree that, with the exception of injunctive relief sought by CafeMom for any violation of CafeMom's proprietary or other rights, any and all disputes relating to these TOS, your use of the Site or the Services shall be resolved by arbitration in accordance with the then-current rules of the American Arbitration Association (the 'AAA') before an independent arbitrator designated by the AAA. The location of arbitration shall be New York, New York, USA.

*Terms of Service*, CAFEMOM.COM, <http://www.cafemom.com/about/tos.php> (last visited June 10, 2012).

463. Compulsory arbitration clauses in mass-market license agreements, computer contracts, or terms of service have been upheld by numerous U.S. courts. *See, e.g.*, *Chandler v. AT&T Wireless Servs., Inc.*, 358 F. Supp. 2d 701, 706 (S.D. Ill. 2005) (ordering arbitration in case where a pre-dispute arbitration clause was added to the consumer's contract for wireless services); *Lieschke v. RealNetworks, Inc.*, No. 99 C 7274, 99 C 7380, 2000 U.S. Dist. LEXIS 1683, at \*7 (N.D. Ill. Feb. 10, 2000) (enforcing arbitration clauses in terms of service agreement); *Westendorf v. Gateway 2000, Inc.*, 41 U.C.C. Rep. Serv. 2d (CBC) 1110, at \*2-3 (Del. Ch. 2000) (holding that the plaintiff was bound to an arbitration clause because she kept her computer for thirty days, thereby accepting Gateway's terms and conditions for sale of the computer and related services); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 530, 532-33 (N.J. Super. Ct. App. Div. 1999) (validating forum selection clause where subscribers to online software were required to review license terms in scrollable window and to click "I Agree" or "I Don't Agree"); *Brower v. Gateway 2000*, 246 A.D.2d 246, 256 (N.Y. App. Div. 1998) (ordering enforcement of arbitration clause in Gateway's standard computer contract); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 203-04 (Tex. App. 2001) (upholding forum selection clause in online contract for registering internet domain names that require users to scroll through terms before accepting or rejecting them); *cf. Specht v. Netscape Commc'ns. Corp.*, 306 F.3d 17, 35 (2d Cir. 2002) (holding that user's downloading software where the terms were submerged did not manifest assent to arbitration clause); *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (declining to enforce arbitration clause on grounds that user did not agree to standard terms mailed inside the computer box).

464. Mann & Siebeneicher, *supra* note 110, at 999.

A growing number of U.S.-based websites impose pre-dispute mandatory arbitration on consumers purchasing their services.<sup>465</sup> Match.com imposed arbitration for all disputes, except for small claims that may be filed only in Dallas County, Texas.<sup>466</sup> The terms of use for Match.com provide binding arbitration administered by the American Arbitration Association as an exclusive means of resolving disputes. The one exception to the exclusivity of pre-dispute mandatory arbitration is that a user may bring an action in small claims court. Pre-dispute arbitration agreements in the consumer market are, in effect, anti-remedies that shield the dominant party from the possibility of a lawsuit, and immunity breeds irresponsibility.<sup>467</sup>

Senator Dick Durbin summarized Congressional testimony that described pre-dispute arbitration as a “field of dreams” for the stronger party but a “nightmare for employees and consumers.”<sup>468</sup> Arbitration is a procedure where the employer or licensor is able to have the advantages of a repeat player against a consumer, who is a one-shotter.<sup>469</sup> Professors Eisenberg, Miller, and Sherwin summarize the case against compulsory arbitration clauses in consumer transactions:

Opponents of mandatory arbitration in consumer contracts characterize these clauses as a limited and often unsatisfactory

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465. See *Terms and Conditions*, HABBO.COM, <https://help.habbo.com/entries/278067-terms-and-conditions-us> (last visited June 10, 2012) (requiring mandatory arbitration); *Terms of Service*, TAGGED.COM, [http://www.tagged.com/terms\\_of\\_service.html](http://www.tagged.com/terms_of_service.html) (last visited June 10, 2012) (same).

466. *Terms of Use Agreement*, MATCH.COM, at para. 23 <http://www.match.com/registration/membagr.aspx> (last revised June 10, 2012) (stating that “[i]n the event that this arbitration agreement is for any reason held to be unenforceable, any litigation against Match.com (except for small-claims court actions) may be commenced only in the federal or state courts located in Dallas County, Texas.”).

467. Professors Eisenberg, Miller and Sherwin found that seventy-five percent of consumer contracts they studied included pre-dispute arbitration clauses.

Using a sample of 26 consumer contracts and 164 nonconsumer contracts from large public corporations, we compared the use of arbitration clauses in firms’ consumer and nonconsumer contracts. Over three-quarters of the consumer agreements provided for mandatory arbitration but less than 10% of the firms’ material non-consumer, non-employment contracts included arbitration clauses.

Theodore Eisenberg, Geoffrey Miller, & Emily Sherwin, *Empirical Studies of Mandatory Arbitration, Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871, 871 (2008).

468. Statement of The Hon. Richard J. Durbin United States Senator from Illinois before United States Senate, Comm. on the Judiciary (July 23, 2008) (“A high-level manager of one of these firms has called mandatory arbitration a ‘field of dreams.’ But as Harvard Law Professor and arbitration judge Elizabeth Bartholet has testified before this Committee, mandatory pre-dispute arbitration can be a nightmare for employees and consumers.”).

469. *Id.*



mode of dispute resolution imposed by economically powerful corporations on unsophisticated consumers without genuine consent. Consumers are deprived of jury trials; instead their claims are judged by private arbitrators who may seek to ingratiate themselves with companies that frequently use their services. Damage awards may be lower in arbitration than in litigation, though evidence supporting this claim is inconclusive. Critics also maintain that mandatory arbitration of consumer disputes is detrimental to the public interest in open resolution of legal controversies. Arbitration proceedings are typically private and do not result in published opinions; therefore, decisions rendered by arbitrators contribute nothing to the body of law [and] have little deterrent effect on future wrongdoing.<sup>470</sup>

MyLife.com, which currently has 200 million profiles, requires registrants to agree to their terms of use applicable to all members.<sup>471</sup> MyLife.com requires users to agree to pre-dispute mandatory arbitration for all disputes.<sup>472</sup> Fotik.com, an online photo sharing community, imposes compulsory arbitration on its users.<sup>473</sup> There is little by way of case law on the enforceability of arbitration provisions in internet-related terms of use.<sup>474</sup> In many social media disputes, the cost of arbitrating a claim will far exceed any monetary remedy sought.

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470. Eisenberg et al., *supra* note 467, at 872–73 (citations omitted).

471. *User Agreement*, MYLIFE.COM, <http://www.mylife.com/UserAgreement.pub> (last visited Feb. 4, 2012).

472. Users “agree to arbitrate all disputes and claims arising out of or relating to this Agreement between MyLife.com and [users].” *Id.* at para. 7.

473. The terms of service agreement for Fotki.com includes the following language:

In the event a dispute shall arise between the parties to this agreement, it is hereby agreed that the dispute shall be referred to a United States Arbitration and Mediation (USA&M) office to be designated by USA&M National Headquarters for arbitration in accordance with the applicable USA&M Rules of Arbitration. The arbitrator’s decision shall be final and legally binding and judgment may be entered thereon. Each party shall be responsible for its share of the arbitration fees in accordance with the applicable Rules of Arbitration. In the event a party fails to proceed with arbitration, unsuccessfully challenges the arbitrator’s award, or fails to comply with the arbitrator’s award, the other party is entitled to costs of suit, including a reasonable attorney’s fee for having to compel arbitration or defend or enforce the award.

*Terms of Service Agreement*, FOTKI.COM, <http://help.fotki.com/terms/> (last updated Dec. 23, 2009).

474. In the pre-Conception case of *Bragg v. Linden Research, Inc.*, a Pennsylvania federal court struck down Second Life’s arbitration clause on the grounds it was unconscionable. 487 F. Supp. 2d 593, 611 (E.D. Pa. 2007). The court found that the developer failed to give the consumer sufficient information on the costs and rules of arbitration in the International Chamber of Commerce. *Id.* at 606. The court reasoned that Second Life could have explained the arbitration procedure in either the terms of use or a hyperlink to another page.

Nevertheless, U.S. courts broadly validate mandatory arbitration provisions in consumer transactions.<sup>475</sup> European courts will not enforce pre-dispute mandatory arbitration clauses because they clash with a Eurozone norm of the consumer's right to litigate in their home court.<sup>476</sup> In *Oceano*, the European Court of Justice (ECJ) held that a clause that selects the seller's principal place of business as the relevant jurisdiction is an unfair term because it may result in a trial far from the consumer's domicile.<sup>477</sup> After *Asturcom*, where the ECJ raised the European Directive at the level of public policy, other courts may rule that European consumers are protected from inconvenient choices of forum or from an enforcement of a foreign arbitral award.<sup>478</sup> The ECJ's extraterritorial application of mandatory consumer rules has implications for U.S. software companies exporting their products to the European consumer market.

Professor Marotta-Wurgler's empirical study of U.S.-style TOU agreements found that in her sample of 647 license agreements, sellers used choice of law and forum selection clauses strategically.<sup>479</sup> In her study, she did not regard "choice of law provisions *per se* as being less buyer

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475. See, e.g., *Lieschke v. RealNetworks, Inc.*, No. 99 C 7274, 99 C 7380, 2000 U.S. Dist. LEXIS 1683, at \*7 (N.D. Ill. Feb. 10, 2000) (upholding end user agreement in website agreement including mandatory arbitration clause citing presumption in favor of arbitration under Federal Arbitration Act); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572, (N.Y. App. Div. 1998) (upholding a Gateway standard clause requiring users to submit to mandatory arbitration even though the standard form was included in the box with the personal computer and software); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 530, 532–33 (N.J. Super. Ct. App. Div. 1999) (upholding arbitration agreement presented in a clickwrap agreement).

476. Article 6.2 of the Unfair Contracts Directive (Council Directive 93/13/EC) requires Member States to:

[T]ake the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.

Council Directive 93/13, *supra* note 269, at art. 6(2).

477. Joined Cases C-240/98 to C-244/98, *Oceano Grupo Editorial SA v. Rocio Murciano Quintero and Salvat Editores SA v. José M. Sánchez Alcón Prades*, 2000 E.C.R. I-4941 (June 27, 2000), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998J0240:EN:HTML>.

478. "For all practical purposes, *Asturcom* establishes that the enforcement of a final arbitral award must not be granted where domestic law allows for a public policy review of final arbitral awards and the national court in its review finds that the arbitration clause is unfair under Directive 93/13 . . . . However, the *Asturcom* reasoning goes much further by generally making article 6 of Directive 93/13 part of public policy . . . . This opens the door for a comprehensive *revision au fond* of the arbitral award contrary to general principles of arbitration law." ECJ Case C 40/08 *Asturcom*—EU Unfair Terms Law Confirmed as a Matter of Public Policy, 28 ASA BULLETIN No. 2 (June 2010), available at [http://www.dorsey.com/files/upload/ASA\\_Graf\\_7210.pdf](http://www.dorsey.com/files/upload/ASA_Graf_7210.pdf).

479. Marotta-Wurgler, *supra* note 52, at 701.

friendly.”<sup>480</sup> The widespread use of U.S. choice of law clauses in TOU agreements is “a strategic gerrymandering of the dispute-resolution process.”<sup>481</sup> It is “the specification of a particular forum or a mandatory arbitration provision” that makes these provisions pro-licensor.<sup>482</sup> Software licensors are able to engage in forum gerrymandering because they are not prohibited from doing so by statute. Courts will only refuse to enforce choice of law agreements to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply.<sup>483</sup> For access contracts and electronic delivery contracts, the choice of law is the law of the jurisdiction where the licensor was located at the time the agreement began.<sup>484</sup> In business-to-business license agreements, the parties have the discretion to choose the law that applies, which is consistent with the Rome I Regulation governing choice of law for the twenty-seven Member States of the EU.<sup>485</sup>

The Rome I Regulation adopted the consumer’s home court rule, which means that for consumer contracts, the governing law is the place where a consumer has her “habitual residence.”<sup>486</sup> The distinctive consumer rules pertain only to natural persons who have their place of residence in European Member States. A consumer must be “regarded as [one] being outside his trade or profession” that deals with another person, the professional, “acting in the exercise of his trade or profession.”<sup>487</sup> Article 6 applies to anyone “direct[ing] such activities” to that Member State or to several States.<sup>488</sup> American-style choices of forum clauses in business-to-consumer licensing transactions are not enforceable because they require European consumers to waive consumer protection.<sup>489</sup>

European courts will annul all forum selection clauses that attempt to deprive the consumer of mandatory consumer protection in their home court. Forum selection clauses will frequently collide with either national law or article 6.2 of the Unfair Contract Terms Directive. The Unfair

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480. *Id.*

481. *Id.* at 702.

482. *Id.* at 701.

483. ABA Working Group, 2002 Amendments to UCITA.

484. Priscilla Walter, *UCITA: ESTABLISHING A LEGAL INFRASTRUCTURE FOR E-COMMERCE* 4 (2002).

485. EU Parliament & Council Regulation on the Law Applicable to Contractual Obligations No 593/2008, June 17, 2008 (EC) (Rome I).

486. *See id.* at art. 6 (explaining mandatory rules for consumer transactions).

487. *Id.*

488. *Id.*

489. *See B2C in Europe and Avoiding Contractual Liability*, *supra* note 260; Oakley, *supra* note 210, at 1067 (asserting that “the Directive also specifically provides that consumers in member states should not lose the protection of the Directive by virtue of a choice-of-law provision in a nonmember country. That would make, for example, the choice of Virginia law in an AOL contract inapplicable within the European Union.”).

Contract Terms Directive provides:

Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.<sup>490</sup>

On the surface, UCITA seems to give the courts wide discretion “to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term.”<sup>491</sup> However, no U.S. court has refused to enforce a TOU agreement on either First Amendment or fair comment grounds. The case law on fundamental public policies applicable to consumer TOU agreements offers almost no guidance to the industry. Courts have set the “public policy” bar too high to be of any help in policing unfair contract terms. The question of whether a public policy is fundamental is an amorphous concept that is of no help to U.S. consumers challenging oppressive forum selection clauses.

The court in *Asturcom* applied the Unfair Term Directive to a mobile phone subscription contract between a Spanish company, Asturcom Telecomunicaciones, and a Spanish consumer, Maria Cristina Rodriguez Nociera.<sup>492</sup> The mobile phone contract contained an arbitration clause under which any dispute concerning the performance of the contract was to be referred for arbitration to the Asociación Europea de Arbitraje de

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490. Council Directive 93/13, *supra* note 269, at art. 6(2). Another case illustrating this principle has been applied by European Court of Justice in *Ingmar G.B. Ltd. v. Eaton Leonard*, Case C-381/98, Judgment of the Court (Fifth Chamber), Nov. 9, 2000, [2000] ECR I-9305. This case regards the Council Directive on commercial agents, which imposes an obligation on the Member States to enact a provision for the indemnification of commercial agents upon the termination of their contracts. In this case, an agent was performing his activities in the UK on behalf of a California firm and the law chosen by the parties to govern the agency contract was the law of California, which did not include such indemnification. The ECJ stated:

[I]t is essential for the Community legal order that a principal established in a non-member country, whose commercial agent carries on his activity within the Community, cannot evade those provisions by the simple expedient of a choice-of-law clause. The purpose served by the provisions in question requires that they be applied where the situation is closely connected with the Community, in particular where the commercial agent carries on his activity in the territory of a Member State, irrespective of the law by which the parties intended the contract to be governed.

Even if this was not a consumer law case, the principle established here is the same as that expressed by the previously mentioned article 6.2 of the Directive 93/13/EC.

491. UCITA § 105(b).

492. *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, Case C-40/08, 2009 EUR-Lex CELEX LEXIS 62008, at para. 27 (Oct. 6, 2009), available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0040:EN:HTML>.

Derecho y Equidad.<sup>493</sup> The terms of service did not mention that the location for arbitration was in Bilbao, Spain.<sup>494</sup> After the consumer failed to make payment on her account after a number of notices, Asturcom obtained an arbitral award ordering Mrs. Nociera to pay the amount of money due.<sup>495</sup> The consumer neither participated in the arbitration nor brought an action for the annulment of the final award.<sup>496</sup> Asturcom sought to enforce a consumer arbitral award but the Juzgado de Primera Instancia (Court of first Instance) refused enforcement ruling that the agreement to arbitrate was unfair.<sup>497</sup>

The Spanish court demonstrated legal realism in its presumption that the consumer had, in effect, an anti-remedy. The court reasoned that the travel costs that would be incurred by the consumer would exceed the sum at issue in the lawsuit.<sup>498</sup> Another shortcoming of arbitration is that arbitrators have no power to rule on their own accord that a given arbitration clause is invalid. Secondly, Law 1/2000 does not contain any provision dealing with a proper jurisdictional court's or tribunal's assessment as to whether arbitration clauses are unfair when adjudicating an action for enforcement of an arbitration award that has become final.<sup>499</sup>

The *Juzgado de Primera Instancia No 4 de Bilbao* expressed doubts as to whether a pre-dispute mandatory arbitration clause was compatible with EU Community consumer law. The court asked the ECJ for an opinion determining whether it could hold a hearing as to the Unfair Contract Terms Directive and whether it had power to apply *res judicata* to the domestic arbitral award.<sup>500</sup> It also asked the ECJ whether the Directive gave it the power to annul arbitral awards that it deemed to be unfair.<sup>501</sup>

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493. *Id.* at para. 20.

494. *Id.*

495. *Id.* at para. 22.

496. *Id.* at para. 23.

497. *Id.* at para. 25.

498. *Id.*

499. *Id.* at para. 26.

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The Unfair Contract Terms Directive . . . introduces a notion of 'good faith' in order to prevent significant imbalances in the rights and obligations of consumers on the one hand and sellers and suppliers on the other hand. This general requirement is supplemented by a list of examples of terms that may be regarded as unfair. Terms that are found unfair under the Directive are not binding for consumers. The Directive also requires contract terms to be drafted in plain and intelligible language and states that ambiguities will be interpreted in favour of consumers. Member States must make sure that effective means exist under national law to enforce these rights and that such terms are no longer used by businesses.

*General Contractual Rights: Unfair Contract Terms*, EUROPA, [http://ec.europa.eu/consumers/rights/gen\\_rights\\_en.htm](http://ec.europa.eu/consumers/rights/gen_rights_en.htm) (last visited Nov. 9, 2011).

501. *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, Case C-40/08, 2009 EUR-Lex CELEX LEXIS 62008, at para. 27 (Oct. 6, 2009), available at

The ECJ ruled that the national court had this power, highlighting the system of mandatory rules in Directive 93/13 as predicated upon the assumption that the consumer is in a vulnerable position vis-à-vis the seller or supplier in terms of bargaining power as well as level of knowledge.<sup>502</sup> article 6 of the Directive provides national courts with a mechanism for policing unfair contract terms in TOUs.<sup>503</sup> The ECJ highlighted article 6's mandatory provision, which aims to establish equality between the rights and obligations of the parties.<sup>504</sup>

The court drew upon *Océano Grupo Editorial and Salvat Editores*<sup>505</sup> and *Mostaza Claro*<sup>506</sup> in its ruling that the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract.<sup>507</sup> As a result, the ECJ held that the national court is required to assess of its own motion whether a contractual term is unfair.<sup>508</sup> The ECJ distinguished *Asturcom* from *Mostaza Claro* because the arbitral award in the former case had become final under Spain's doctrine of *res judicata*.<sup>509</sup> The Spanish court acknowledged the role of *res judicata* for creating certainty in the law.<sup>510</sup> However, the ECJ acknowledged that even the doctrine of *res judicata* is subject to the EU Principles of effectiveness and equivalence.<sup>511</sup> *Res judicata*, the ECJ reasoned, must not be a barrier preventing consumers from exercising mandatory rights conferred by European Union law.<sup>512</sup> Spanish law, in this case, gave the consumer a time limit of two months from the notification of the arbitral award to exercise an action of annulment.<sup>513</sup> According to the ECJ, this period satisfied the principle of effectiveness.<sup>514</sup>

The court then focused on the principle of equivalence.<sup>515</sup> The principle of equivalence requires courts to ensure that consumers do not

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<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0040:EN:HTML>.

502. *Id.* at para. 29.

503. *Id.* at para. 30.

504. *Id.*

505. Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores* 2000 E.C.R. I-4941 (June 27, 2000), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998J0240:EN:HTML>.

506. Case C-168/05 *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* 2006 E.C.R. I-10421 (Oct. 26, 2006), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0168:EN:HTML>.

507. *Id.* at para. 31.

508. *Id.* at para. 32.

509. *Id.* at para. 33.

510. *Id.* at para. 36.

511. *Id.* at para. 38.

512. *Id.* at para. 39.

513. *Id.* at para. 15.

514. *Id.* at para. 46.

515. *Id.* at para. 49.

have less protection under community law than they would under domestic law. This doctrine requires that the conditions imposed by domestic law under which courts and tribunals apply a rule of community law of their own motion, must not be less favorable than those governing the application of the rules of domestic law of the same ranking.<sup>516</sup> In other words, the main issue was how to determine which claims are equivalent. On this point, the court held that in view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, article 6 of the directive must be regarded as a provision of equal standing to national rules that rank within the domestic legal system as rules of public policy.<sup>517</sup> It is likely that a national court or tribunal may motion to challenge a pre-dispute mandatory arbitration clause in a consumer TOU. A court or other tribunal could employ domestic rules of public policy to strike down pre-disputed arbitration clauses as unfair under article 6.<sup>518</sup>

By raising article 6 of the Unfair Term Directive to the level of public policy, the court empowers European consumers to challenge all pre-dispute mandatory arbitration clauses as an unfair contracting practice. Consumers may not only question the fairness of a specific arbitration clause, but also challenge the fairness of any other TOU term interpreted or rendered by a given arbitral tribunal by citing the European-wide Directive.<sup>519</sup> This finding opens the door to a more comprehensive review of such contractual provisions. Furthermore, the courts may judicially review TOUs and other contracts *ex officio* without an action filed by a party. More important, as pointed out by some commentators, even though in the present case the court had to deal with a purely domestic case, “it can be expected that, as in the case of competition law rules in *Eco-Swiss*, the ECJ would likewise consider the EU law related to unfair terms to rank as public policy in a defense against the enforcement of a foreign arbitral award under the New York Convention.”<sup>520</sup> Article V (2)(b) provides that “Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country.”<sup>521</sup>

This finding has implications for all U.S.-style TOUs that contain pre-

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516. *Id.*

517. *Id.* at para. 52.

518. *Id.* at para. 53.

519. Bernd Ulrich Graf & Arthur E. Appleton, *ECJ Case C 40/08 Asturcom – EU Unfair Terms Confirmed as a Matter of Public Policy*, 28 ASA BULLETIN No. 2/2010, 416 (2010).

520. *Id.* at 417.

521. *Id.* at 417; Christian Koller, *Round Two: Arbitration Clauses in B2C Contracts v. EU Public Policy* (Nov. 20, 2009), available at [http://www.arbitration-austria.at/arbaut\\_blog\\_rss\\_view.php?blogID=59](http://www.arbitration-austria.at/arbaut_blog_rss_view.php?blogID=59).

dispute mandatory arbitration clauses. U.S. content providers should assume that it is likely that no European court will enforce such provisions nor a U.S. arbitral decision against a European consumer, thus rendering ineffective the arbitration clause often used by American companies in their consumer license agreements.

Italian courts, interpreting European directives, are not receptive to enforcing forum selection clauses in consumer transactions. Sky Italia, an Italian cable company, threatened to sue Mr. Mita Enrico because he used a smart card in a bar, a public place, breaching the license agreement.<sup>522</sup> The license contract allowed a consumer to watch TV programs in the privacy of his own home, but not in a public place. Specifically, Sky threatened to enforce a contract term that unilaterally determined an amount between €2,500.00 and €6,960.00, as damages for breach of contract.<sup>523</sup>

Sky Italia answered the consumer's lawsuit by bringing its own breach of contract claim and moving to compel a forum selection clause, which required that all disputes relating to the agreement were subject to the decision of the Tribunal of Milano, the city where they were located.<sup>524</sup>

At the hearing of December 31, 2006, Sky Italia decided to not enforce the forum selection clause. As pointed out by the judge, if Sky Italia has been insistent in pursuing the enforcement of the forum selection clause it would not succeed.<sup>525</sup> After that the judge established that the art. 1469-bis c.c. implementing the European Directive 93/13/CE applies to the present case, he reported the interpretation of the art. 1496-bis comma 2 n. 19 of the Italian Civil Code provided by the Corte di Cassazione establishing that a clause, which selects as a forum a place that is different from the consumer's residence or domicile, must be regarded as unfair and therefore void.<sup>526</sup> This is true unless the seller proves that the clause was individually negotiated.<sup>527</sup>

Then, the judge evaluated the unfairness of the clause that unilaterally determined an amount of money to be paid by the consumer in case of breach of contract in light of the Italian law implementing the Unfair Term Directive.<sup>528</sup>

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522. Giudice di Pace di Casarano, 11 Gennaio 2010, *available at* <http://www.informazione.it/pruploads/06dee925-a945-4b09-a3ba-f7865d1b002e/Sentenza%20SKY%20Avv.%20Storella%2016-03-2010%20.pdf>.

523. *Id.*

524. *Id.*

525. *Id.*

526. *Id.*

527. *Id.*

528. He took in consideration the art. 1469-bis, comma 3, n.6 implementing the Unfair Term Directive that regards as unfair a clause requiring any consumer who fails to fulfill his obligation to pay a disproportionately high sum in compensation. Also, it relies on the art. 1469-ter comma 1 providing that "the unfairness of a contractual term shall be assessed,



The judge reasoned that the purpose of the Unfair Contracts Directive was to protect the consumer as the weaker party from undue influence and pressure by the seller.<sup>529</sup> The court also found that Sky Italia presented its agreement on a “take it or leave it” basis; the consumer was presented with a pre-drafted contract.<sup>530</sup> The Directive provides that “[w]here any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.”<sup>531</sup> As a result, the judge determined that a seller could not rely on a unilaterally pre-drafted declaration included in a standard contract to satisfy the burden of proof; the court reasoned that this standard form contract violated the spirit of Directive 93/13, which serves to protect the consumer as the weaker party.<sup>532</sup> After verifying that Sky Italia had provided the consumer a pre-drafted contract to be signed without any specific negotiation of the single clauses, the judge turned to the Unfair Contract Terms Directive (“UCTD”) to evaluate the unfairness of the non-negotiated clause.<sup>533</sup>

The UCTD regards it as unfair to require “any consumer who fails to fulfill his obligation to pay a disproportionately high sum in compensation.”<sup>534</sup> The court considered the annual Sky membership of €564.00 to be excessive<sup>535</sup> and reasoned that Sky Italia had the burden to prove the amount of the membership for public use to allow the court to determine the amount of damage suffered by Sky.<sup>536</sup> Because Sky did not produce this information, the court took into consideration the annual membership provided in the contract between Sky and Mita Enrico to evaluate its unfairness.<sup>537</sup> The judge refused to enforce the non-negotiated unfair clause and awarded the consumer €1,590.00 to defray his legal

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taking into account the nature of the goods or services for which the contract was concluded” and the comma 4 providing that “the terms or aspects of a term that have been individually negotiated cannot be regarded as unfair.” Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him. According to the jurisprudence, an individual negotiation does not require just the simple approval of the unfair clause by the consumer, but requires an active participation of the consumer. The declaration of the consumer that the single term was subject to a previous negotiation, if included in a pre-formulated standard contract, is not enough to prove that an individual negotiation took place. As a result, the judge excluded that a seller could rely on a unilaterally pre-drafted declaration, included in a standard contract, in order to satisfy the burden of proof.

529. *Id.*

530. *Id.*

531. Council Directive 93/13, *supra* note 269, at art. 3 comma 2.

532. Giudice di Pace di Casarano, *supra* note 522.

533. *Id.*

534. Council Directive 93/13, *supra* note 269.

535. Giudice di Pace di Casarano, *supra* note 522.

536. *Id.*

537. *Id.*

expenses.<sup>538</sup>

While these cases involved Italian licensors and licensees, a court is likely to stretch the UCTD to govern consumer contracts between European consumers and American companies. This is even more probable after *Asturcom Telecomunicaciones*, where the ECJ established that article 6 of the Council Directive 93/13 rose to the level of European-wide public policy. If consumers can submit costs to an impartial body at no cost, European courts will likely not object to such proceedings.<sup>539</sup>

*E. Fifth Point: What's Wrong With Anti-Class Action Waivers*

Class action waivers have the practical effect of denying justice to large number of consumers by divesting them of the right to pursue relief under state consumer law. Class actions are, in effect, the keys to the courtroom since they enable consumers to curtail unfair and deceptive trade practices. Without class actions, vendors of goods and services may avoid judicial process and continue unfair practices with impunity. Immunity breeds irresponsibility in the information-age economy where an increasing number of companies are divesting consumers of any remedy by including class action waivers in their terms of service.<sup>540</sup> Match.com prohibits its users from filing class actions, class arbitration, or other representative actions or proceedings.<sup>541</sup> Tagged's TOU establishes mandatory arbitration as the baseline but does not require them to waive their right to join class actions and allows actions in small claims courts:

Notwithstanding the foregoing, and in lieu of arbitration, either you and/or Tagged may bring an individual action against the other in small claims court. Additionally, you and/or Tagged

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<sup>538</sup>. *Id.*

<sup>539</sup>. Since 1993, *consumers* have been able to submit disputes at no *cost* to the Juntas Arbitrales de Consumo, a domestic *arbitration* body whose role is to supervise *consumer arbitrations*. GARY BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 829 (3d ed. 2010).

<sup>540</sup>.

A class action by consumers produces several salutary byproducts, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.

*Vasquez v. Super. Ct. of San Joaquin Cnty.*, 484 P.2d 964, 968–69 (Cal. 1971). Without the mechanism of class action, a consumer with a small dollar claim will be unable to obtain redress for his or her claim.

<sup>541</sup>. *Terms of Use*, MATCH.COM, <http://www.match.com/registration/membagr.aspx> (last visited June 10, 2012) (“YOU ALSO GIVE UP YOUR RIGHT TO PARTICIPATE IN A CLASS ACTION OR OTHER CLASS PROCEEDING. Your rights will be determined by a NEUTRAL ARBITRATOR, NOT A JUDGE OR JURY”).

may bring any Claim against the other to the attention of a federal, state and/or local government entity, which may elect to seek relief against Tagged on your behalf, and/or against you on Tagged's behalf.

You agree that you and Tagged hereby have voluntarily and intentionally waived any and all right to a trial by jury, and (except as otherwise specifically provided in this Agreement) any and all right to participate in a class action.<sup>542</sup>

Match.com, a popular dating networking site, requires that users agree to pre-dispute mandatory arbitration covering all disputes except for small claims.<sup>543</sup> Match.com's terms of service strip consumers of their right to join a class action as a condition of membership: "[W]hether you choose arbitration or small-claims court, you may not under any circumstances commence or maintain against Match.com any class action, class arbitration, or other representative action or proceeding."<sup>544</sup>

Social networking sites likely include mandatory arbitration clauses strategically so that consumers are unable to file class actions.<sup>545</sup> Match.com, the dating website, requires users to enter into a terms of use agreement, whether they register or not with the service.<sup>546</sup> VampireFreaks.com requires users to submit to arbitration and waive their right to joining a class action.<sup>547</sup> Hi5 requires users to submit to pre-dispute

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542. *Terms of Service*, TAGGED, [http://www.tagged.com/terms\\_of\\_service.html](http://www.tagged.com/terms_of_service.html) (last updated Sept. 30, 2011).

543. The TOUs for Match.com include the following language:

The one exception to the exclusivity of arbitration is that you have the right to bring an individual claim against Match.com in a small-claims court of competent jurisdiction. But whether you choose arbitration or small-claims court, you may not under any circumstances commence or maintain against Match.com any class action, class arbitration, or other representative action or proceeding.

*Terms of Use*, MATCH.COM, <http://www.match.com/registration/membagr.aspx> (last updated Apr. 9, 2012).

544. *Id.*

545. Theodore Eisenberg & Geoffrey Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 335 (2007) (arguing that these clauses were included in consumer contracts to side-step class actions or aggregate dispute resolution).

546. The TOUs for Match.com include the following language:

By using the Match.com Website, (the 'Website') you agree to be bound by these Terms of Use (this 'Agreement'), whether or not you register as a member of Match.com ('Member'). If you wish to become a Member and make use of the Match.com service (the 'Service'), please read these Terms of Use. If you object to anything in this Agreement or the Match.com Privacy Policy, do not use the Website or the Service.

*Terms of Use*, MATCH.COM, <http://www.match.com/registration/membagr.aspx> (last updated Apr. 9, 2012).

547. *Terms of Use and Agreement*, VAMPIREFREAKS.COM,

mandatory arbitration but retains the right to seek legal remedies for itself.<sup>548</sup>

Class action waivers are increasingly common in consumer transactions such as “credit card agreements, mobile or other telephone service, and securities transactions.”<sup>549</sup> In *AT&T Mobility LLC v. Concepcion*,<sup>550</sup> the U.S. Supreme Court held that the Federal Arbitration Act (“FAA”) prohibited California from refusing to enforce mandatory consumer arbitration clauses that prohibit class actions.<sup>551</sup> The U.S. Supreme Court decided the issue of “whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures.”<sup>552</sup> The *Concepcions*, who were consumers, entered into a cellular telephone service agreement drafted by the wireless provider.<sup>553</sup> The consumers filed a class action against AT&T for falsely advertising a mobile phone discount when, in fact, the carrier charged a sales tax on the full retail price of the telephone.<sup>554</sup>

The Court noted how the AT&T agreement “provided for arbitration of all disputes between the parties, but required that claims be brought in the parties’ individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.”<sup>555</sup> AT&T asserted that it had the right to make unilateral modifications to the terms of service, which it did several times.<sup>556</sup> The Court stated that “the clause in § 2 of the FAA [Federal Arbitration Act] that requires enforcement of an arbitration agreement . . .” does not “preserve state-law rules that stand as an obstacle

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<http://vampirefreaks.com/termservice.php> (last updated Dec. 22, 2007) (stating that mandatory arbitration is the exclusive forum for all disputes arising out of the platform and requires waiver of class action rights).

548.

Each party shall bear its own costs (including attorney fees) and disbursements arising out of the arbitration, and shall pay an equal share of the fees and costs of the ADR Provider. Notwithstanding the foregoing, hi5 may seek injunctive or other equitable relief to protect its intellectual property rights in any court of competent jurisdiction. Please note that the laws of the jurisdiction where you are located may be different from California law. You shall always comply with all the international and domestic laws, ordinance, regulations and statutes that are applicable to your use of the Services.

*Terms of Service*, hi5, [http://hi5.com/terms\\_of\\_service.html](http://hi5.com/terms_of_service.html) (last updated Feb. 29, 2012).

549. BORN, *supra* note 539, at 115 (discussing class action waivers in arbitration agreements).

550. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

551. *Id.*

552. *Id.* at 1744.

553. *Id.*

554. *Id.*

555. *Id.*

556. *Id.*

to the accomplishment of the FAA's objectives."<sup>557</sup> Concepcion's emblematic principle "is that a state law that prohibits the arbitration of claims is preempted by the FAA."<sup>558</sup> The *Concepcion* Court reasoned that it is important that "arbitration agreements [be] on an equal footing with other contracts . . . and [that they be] enforce[d] . . . according to their terms."<sup>559</sup>

Prior to the Court's decision in *Concepcion*, California treated class action waivers in arbitration clauses to be unenforceable, as in *Gatton v. T-Mobile U.S.A., Inc.*, because they are procedurally and substantively unconscionable.<sup>560</sup> The *Gatton* court, for example, found that the way wireless providers presented the arbitration clause to consumers was unconscionable as was its prohibition on consumers filing class actions.<sup>561</sup> In addition, the court found the anti-class action provision to be substantively unconscionable since providers such as T-Mobile rarely, if ever, will file class actions against their customers.<sup>562</sup>

In the wake of *Concepcion*, Sony recently modified its terms of use agreement to include an anti-class action waiver.<sup>563</sup> "[C]onsumers must waive the right to participate in any class-action lawsuit filed after August 20, [2011] against the gaming and content delivery portion of Sony."<sup>564</sup> Consumers may opt out of the class action waiver by sending a written letter to Sony's headquarters.<sup>565</sup> In *Nelson v. AT&T Mobility LLC*,<sup>566</sup> a California court refused to enforce an arbitration clause with an anti-class action waiver where a consumer was seeking an injunction under California state law.

Pre-dispute mandatory arbitration clauses prohibiting class actions strip consumers of their rights. A forum selection clause is a provision in

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557. *Id.* at 1748.

558. *Id.* at 1747.

559. *Id.* at 1745 (internal quotation marks and citations omitted).

560. *Gatton v. T-Mobile U.S.A., Inc.*, 152 Cal. App. 4th 571, 588 (Cal. App. 1 Dist. 2007); *see also* *In re RealNetworks, Inc., Privacy Litigation*, No. 00-C-1366, 2000 WL 631341, at \*5 (N.D. Ill. May 8, 2000) (holding that an agreement that is stored digitally, and that cannot be printed or saved in any readily discernible manner, is a "written agreement," and that an arbitration clause is not unconscionable merely because the agreement does not draw attention to it).

561. *Id.* at 588 (finding that "evidence of procedural unconscionability is limited," but that the evidence of substantive unconscionability [was] strong enough to tip the scale and render the arbitration provision unconscionable").

562. *Id.* at 586.

563. Christopher MacManus, *Questioning Sony's New Class Action Waiver*, CNET NEWS (Sept. 18, 2011), [http://news.cnet.com/8301-17938\\_105-20107825-1/questioning-sonys-new-class-action-waiver](http://news.cnet.com/8301-17938_105-20107825-1/questioning-sonys-new-class-action-waiver).

564. *Id.*

565. *Id.*

566. *Nelson v. AT&T Mobility LLC*, No. C10-4802 TEH, 2011 U.S. Dist. LEXIS 92290, at \*12 (N.D. Cal. Aug. 18, 2011).

which the parties agree on an exclusive forum to settle any dispute arising out of the mass-market license agreements. The U.S. Supreme Court in *Carnival Cruise Lines v. Shute*,<sup>567</sup> validated a forum selection clause that prescribed Florida as the forum for all disputes involving the cruise line. The Court reasoned that unless the consumer proved that he or she acceded to this provision because of fraud or overreaching, the forum selection clause was enforceable, provided the consumer was given notice of the provision and an opportunity to reject it.<sup>568</sup> The vast majority of U.S. courts enforce forum selection clauses even though in the real world few consumers appreciate that they are agreeing before the fact to litigate in a distant forum.<sup>569</sup>

Under the Brussels Regulation articles 15-16, consumers in the Eurozone are entitled to have their disputes settled in a local forum, because the licensor is in a better position to afford the travel expenses associated with the litigation.<sup>570</sup> In *Ingmar G.B. Ltd. v. Eaton Leonard Tech., Inc.*, the European Court of Justice (ECJ) held that “a principal established in a non-member country, whose commercial agent carries on his activity within the Community, cannot evade those provisions by the simple expedient of a choice-of-law clause.”<sup>571</sup> Even though *Ingmar* was decided in a business-to-business context, the principle of advancing EU

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567. 499 U.S. 585, 595 (1991).

568. *Id.* (upholding a forum selection clause as enforceable unless the consumers “accession to the forum clause” was a product of “fraud or overreaching” given that they had notice of the forum and “therefore, presumably retained the option of rejecting the contract with impunity”).

569. *See, e.g.*, *Koch v. Am. Online, Inc.*, 139 F. Supp. 2d 690, 695–96 (D. Md. 2000) (upholding choice of forum clause requiring all claims against AOL to be adjudicated in Virginia); *see also* *Forrest v. Verizon Comm., Inc.*, 805 A.2d 1007, 1012 (D.C. 2002) (similar holding); *Am. Online, Inc. v. Booker*, 781 So. 2d 423, 425 (Fla. Dist. Ct. App. 2001) (similar holding); *Celmins v. Am. On Line*, 748 So. 2d 1041, 1041–42 (Fla. Dist. Ct. App. 1999) (upholding AOL’s forum selection clause); *Groff v. Am. Online, Inc.*, No. PC 97-0331, 1998 R.I. Super. LEXIS 46, at \*16 (Super. Ct. R.I. May 27, 1998) (same holding).

570. Brussels Regulation, *supra* note 220, at arts. 15–17.

571. *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*, Case C-381/98, 2000 E.C.R. I-9305. This case regards the Council Directive on commercial agents, which imposes an obligation on the Member States to enact a provision for the indemnification of commercial agents upon the termination of their contracts. In this case, an agent was performing his activities in the UK on behalf of a California firm and the law chosen by the parties to govern the agency contract was the law of California, which did not include such indemnification. The ECJ stated that:

[I]t is essential for the Community legal order that a principal established in a non-member country, whose commercial agent carries on his activity within the Community, cannot evade those provisions by the simple expedient of a choice-of-law clause. The purpose served by the provisions in question requires that they be applied where the situation is closely connected with the Community, in particular where the commercial agent carries on his activity in the territory of a Member State, irrespective of the law by which the parties intended the contract to be governed.

mandatory provisions such as the Unfair Contract Terms Directive is the same. The ECJ would likely rule that the Unfair Contracts Directive would have an extraterritorial effect so not as to evade its mandatory provisions.<sup>572</sup> In France, commentators believe that shrinkwrap licenses can be held valid if the user is aware that she is assenting to the terms of the license by tearing open the package.<sup>573</sup>

However, French Courts will vigilantly police clauses that violate the Unfair Contracts Terms Directive. American-style forum selection clauses in business-to-consumer licensing transactions clash with that Directive. Article 6.2 provides that

[m]ember States shall take the necessary measures to ensure that the consumer does not lose the protections granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.<sup>574</sup>

U.S. companies can assume that their choice of law and forum clauses are unenforceable in the Eurozone.

*F. Sixth Point: What's Wrong With Anti-Reverse Engineering Clauses?*

Proprietary software companies include anti-reverse engineering clauses because they regard source code as a trade secret. Software licensors frequently prohibit reverse engineering, a proposition illustrated in Nvidia's license agreement.<sup>575</sup> The Reporters for the ALI's Principles of the Law of Software Contracts acknowledge that anti-reverse engineering clauses are "troublesome terms."<sup>576</sup> Software licenses frequently prohibit reverse engineering so that customers do not work "backward to derive the unprotected source code."<sup>577</sup> These prohibitions have been enforced in the United States. The Federal Circuit, for example, upheld a reverse

572. See Council Directive 93/13, *supra* note 269, at art. 7.

573. Clarisse Girot, *La Validité des Licences de Logiciel sous Plastique en Droit Français: les Enseignements du Droit Comparé* [Validity of Shrinkwrap Licenses in French Law: the Lessons of Comparative Law], 1998 DROIT DE L'INFORMATIQUE ET DES TELECOMS [COMPUTER & TELECOMS LAW REVIEW] 7.

574. Council Directive 93/13, *supra* note 269, at art. 6. Another case illustrating this principle is *Ingmar GB Ltd. v. Eaton Leonard Tech., Inc.*, Case C-381/98, 2000 E.C.R. I-9305. See *supra* text accompanying note 573.

575. "No Reverse Engineering. Customer may not reverse engineer, decompile, or disassemble the SOFTWARE, nor attempt in any other manner to obtain the source code." *License for Customer Use of NVIDIA Software*, NVIDIA, [http://www.nvidia.com/object/nv\\_swlicense.html](http://www.nvidia.com/object/nv_swlicense.html) (last visited June 10, 2012).

576. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 1.09 (2009).

577. RUSTAD, *supra* note 1, at 617.

engineering clause in *Bowers v. Baystate Technologies, Inc.*<sup>578</sup>

European courts would not likely enforce anti-reverse engineering clauses that prohibited reverse engineering to achieve interoperability because of the Software Directive. In Europe, all users of software have a right to reverse engineer code to achieve interoperability of computer programs under the Software Directive adopted in 1991.<sup>579</sup> Software licensors and content creators asserting overly expansive restrictions in their licensing agreements are using contract law to infringe basic human rights of expression and inquiry.

*G. Seventh Point: What's Wrong With Gag Clauses in Licenses or TOUs?*

The English Court of the Star Chamber was synonymous with “secrecy, severity and extreme injustice.”<sup>580</sup> The licensing of books and the prosecution of those who distributed books without a license were the chief means of censorship of the press in Sixteenth Century England.<sup>581</sup>

When software licensors or other content providers impose restrictions on speech, the First Amendment prohibition on prior restraints is not applicable since there is no state action. “No comment” or gag clauses first evolved in software licenses. Software licensors included a clause in their agreements that prohibited public comment on benchmark testing of their products:

In one instance, *Network World* magazine was testing Microsoft SQL 7 and found that it ran twice as fast on Windows NT as on Windows 2000. The tester consulted with Microsoft to see if there was a setup problem but none was found. Microsoft then threatened legal action based on the DeWitt Clause if the results were published. *Network World's* lab director said, “[w]e have been intimidated into not going forward with our results because we don't have the pockets to battle Microsoft in court.” The results of the test were published, removed and then republished. Another incident involved a report comparing IBM and Microsoft databases that Microsoft forced IBM to remove from a web posting. A favorable report on Microsoft's Visual C++ was almost not published because the writer of the report had significant difficulty actually contacting someone for the permission required by the EULA.<sup>582</sup>

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578. 320 F.3d 1317, 1327–28 (Fed. Cir. 2003).

579. Council Directive 91/250/EEC, 1991 O.J. (L 122) 42 (EC).

580. Daniel L. Vande Zande, *Coercive Power and the Demise of the Star Chamber*, 50 AM. J. LEGAL HIST. 326, 326 (2010).

581. *Id.* at 332.

582. Anthony G. Read, Note, *Dewitt Clauses: Can We Protect Purchasers Without*



Clauses in U.S.-based TOUs that prohibit public criticism of content or other information-based products do not violate the First Amendment because there is no state action. A software publisher boldly included a clause in its TOU preventing its customer from “disclosing details about bugs, defects, and contractual breaches with the press, peers, and user groups.”<sup>583</sup> The Uniform Computer Information Transactions Act (UCITA) disfavors gag clauses that attempt to restrain public discussion about software or other digital content.<sup>584</sup> The UCITA seemingly gives the courts discretion to “avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term” though there is no case law interpreting this provision.<sup>585</sup> The UCITA Standby Committee would go even further in prohibiting clauses restricting public comment:

In a transaction in which a copy of computer information is offered in its final form to the general public including consumers, a term of a contract is unenforceable to the extent that the term prohibits an end-user licensee from engaging in otherwise lawful public discussion of the quality of performance of the computer information. However, this section does not preclude enforcement of a contract term that establishes or enforces rights under trade secret, trademark, defamation, commercial disparagement, or other laws.<sup>586</sup>

Public policy has rarely been used to strike down terms of service even where there has been an extreme imbalance of rights.<sup>587</sup> In *People v. Network Ass'ns*,<sup>588</sup> New York Attorney General Elliot Spitzer challenged a “no public comment” rule in a license agreement. The software license agreement challenged by the state attorney general contained the following terms:

Installing this software constitutes acceptance of the terms and conditions of the license agreement in the box. Please read the license agreement before installation. Other rules and regulations

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*Hurting Microsoft?*, 25 REV. LITIG. 387, 398–99 (2006) (alteration in original) (internal footnotes omitted).

583. R. “Ray” Wang, *Tuesday’s Tip: Software Licensing and Pricing—Now’s The Time to Remove ‘Gag Rule’ Clauses in Your Software Contracts*, A SOFTWARE INSIDER’S POINT OF VIEW (Jan. 27, 2009), <http://blog.softwareinsider.org/2009/01/27/tuesdays-tip-nows-the-time-to-remove-gag-rule-clauses-in-your-software-contracts/>.

584. UCITA § 105 cmt. 4 (2002).

585. *Id.* § 105(b).

586. Report of UCITA Standby Committee, Recommendation 5 (Dec. 17, 2001) available at [http://www.law.upenn.edu/bll/archives/ulc/ucita/UCITA\\_Dec01\\_Proposal.htm](http://www.law.upenn.edu/bll/archives/ulc/ucita/UCITA_Dec01_Proposal.htm) (last visited Jan. 24, 2012).

587. See RUSTAD, *supra* note 1, at 616 (“To date, courts have provided the software industry with little guidance as to which terms violate public policy.”).

588. *People v. Network Ass’n*, 758 N.Y.S.2d 466 (2003).

of installing the software are:

- a. The product cannot be rented, loaned, or leased—you are the sole owner of this product.
- b. The customer shall not disclose the result of any benchmark test to any third party without Network Associates' prior written approval.
- c. The customer will not publish reviews of this product without prior consent from Network Associates, Inc.<sup>589</sup>

The New York trial court enjoined the enforcement of “language restricting the right to publish the results of testing and review.”<sup>590</sup> In the past four decades, few courts have challenged gag clauses. While there is no case law on point, it is likely that no court in the Eurozone would enforce these clauses. In the past four decades, few U.S. courts have policed clauses that restrict a consumer’s right to freely speak about defects in software or content. However, prohibitions against public comment clauses would likely be an unfair practice under the EU Directive on Unfair Contract Terms.

#### *H. Eighth Point: The U.S. “Duty to Read” Rule*

The consumer’s duty to read is a well-established principle of U.S. contract law. Courts have gone so far as to hold that even a “justifiable reliance standard did not eviscerate a consumer’s duty to read.”<sup>591</sup> An empirical study of terms of use agreements concluded that only a handful of users actually read terms of use or contractual provisions before clicking “I accept.” Florencia Marotta-Wurgler, an associate professor at New York University School of Law, presented her research before a U.S. Senate Committee hearing on online contracting practices.<sup>592</sup> Professor Marotta-

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589. *Id.* at 467.

590. *Id.* at 470.

591. *Sanford v. H.A.S., Inc.*, 136 F. Supp. 2d 1215, 1221 (M.D. Ala. 2001) (compelling a consumer arbitration in a used car sale and financing of the transaction); *Mladineo v. Schmidt*, 52 So. 3d 1154, 1162 (Miss. 2010) (“Thus, the ‘duty-to-read’ and ‘imputed-knowledge’ doctrines are firmly rooted in Mississippi precedent.”); *see also* *Cherry v. Anthony*, Gibbs, Sage, 501 So. 2d 416, 419 (Miss. 1987) (“Even if [the insureds] had not [read the subject insurance policy], knowledge of its contents would be imputed to them as a matter of law.”); *Zepponi v. Home Ins. Co.*, 161 So. 2d 524, 526 (Miss. 1964) (holding as a matter of law that where the insured’s mortgagee required insurance and had possession of the subject insurance policy, the insured is charged with knowledge of the terms of the policy because he relied on the policy for protection). Thus, the “duty-to-read” and “imputed-knowledge” doctrines are firmly rooted in Mississippi precedent.

592. *Aggressive Sales Tactics on the Internet and Their Impact on American Consumers: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 2009 Leg., 1st Sess. 24–39 (testimony of Prof. Florencia Marotta-Wurgler, Assoc. Professor, NYU Sch’l of Law).

Wurgler and two co-authors studied the online browsing behavior of greater than 45,000 households for sixty-six major vendors and concluded that only one or two consumers in a thousand actually read online contracts.<sup>593</sup> Moreover, the researchers found that of this miniscule number, the average amount of time spent reading the contract was a mere twenty-nine seconds.<sup>594</sup> The NYU researchers concluded that in their sample of clickwrap agreements, the average length of the agreement was 2,277 words and therefore Internet users could not have read such extensive contracts in less than a minute.<sup>595</sup>

Professor Marotta-Wurgler and her team contend that the widespread practice of post-transaction marketing is deceptive because vendors exploit the empirical reality that consumers do not read online contracts.<sup>596</sup> Professor Marotta-Wurgler's research team explains how vendors construct post-transaction offers in deceptive ways lulling consumers into complacency:

Post-transaction marketers often identify their offers as rewards or bonuses that the consumers in fact should be grateful to receive. Offers may feature a prominently displayed coupon with a title such as "\$10 off your next purchase—Good for your next Fandango Purchase" or "\$10 CASH BACK ON YOUR PURCHASE TODAY!" Fandango is a very popular vendor of movie tickets, among other products. (See for example, Exhibits B and C.) It is natural to imagine that the new offer is part of the original transaction.

The offers also splash relatively larger-font terms around the page such as "Congratulations," "MEMBER REWARDS," and "Thank You . . . Please Complete Your Survey and Claim Your Reward." These phrases are likely to distract attention from the disclosures that explain the new charges associated with the new offer.<sup>597</sup>

The NYU School of Law researchers also found that online vendors deceptively positioned terms so that most consumers would overlook them.<sup>598</sup> They concluded that post-transaction marketers "should be required to identify themselves."<sup>599</sup> They also recommend that the marketers improve their disclosures and implement a means for consumers to cancel the contract and obtain a refund.<sup>600</sup>

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593. *Id.* at 4.

594. *Id.*

595. *Id.*

596. *Id.*

597. *Id.* at 5.

598. *Id.*

599. *Id.* at 6.

600. *Id.*

UCITA broadly validates standard-form licenses “only if the party agrees to the license, such as by manifesting assent, before or during the party’s initial performance or use of or access to the information.”<sup>601</sup> Nevertheless, consumer TOUs are broadly enforceable so long as the license satisfies three conditions: (1) the customer has an opportunity to review the terms of the license, (2) the user manifests assent after having an opportunity to review the terms, and (3) the actions are “attributable in law” to the customer.<sup>602</sup> When U.S. companies are doing business in Europe, they should remember that Europe has much more rigorous and definitive consumer rules than the United States.

The U.S. approach to TOUs is that consumers’ duty to read is satisfied so long as they have an opportunity to view the terms and manifest assent.<sup>603</sup> Courts in the Eurozone do not enforce TOUs simply because they meet the procedural standards of giving a consumer an opportunity to review the terms and a method for manifesting assent. The consumer provisions of the Brussels and Rome I Regulations, for example, are non-waivable.<sup>604</sup> Habbo, the social networking site for teenagers, imposes a duty on all users to read and review their terms of use on a weekly basis so that they may learn of new terms and conditions.<sup>605</sup>

While no U.S. court has ruled on the enforceability of a social networking sites’ terms of service, the Ninth Circuit in *Douglas v. U.S. Court* ruled that Talk America customers had no obligation to check the company’s website “on a periodic basis to learn whether” the company had changed them because this was a unilateral modification.<sup>606</sup> Moreover, the

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601. UCITA § 209(a).

602. *Id.* § 112, cmt. 2.

603. *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Ca. 2000).

604. Article 17 of the Brussels Regulation provides that the mandatory consumer rules may not be modified by agreement, except the parties may agree to allow a consumer “to bring proceedings in courts other than those indicated in this Section.” Brussels Regulation, *supra* note 220, at art. 17.1.

Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

EU Parliament & Council Regulation on the Law Applicable to Contractual Obligations No 593/2008 (June 17, 2008) (EC), at art 6(2), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF>.

605. *Terms and Conditions—US*, HABBO (Oct. 1, 2010, 04:03 AM), <https://help.habbo.com/entries/278067-terms-and-conditions-us> (“You agree to review these Terms of Use on at least a weekly basis to be aware of Changes (as defined herein). Our employees cannot change the terms of these Terms of Use except as posted on these Services.”).

606. *Douglas v. U.S.D.C. C.D. Cal.*, 495 F.3d 1062, 1066 (9th Cir. 2007).

court also reasoned that assent could not be predicated upon a consumer's continued use of the Talk America Service, because "assent can only be inferred after he received proper notice of the proposed changes."<sup>607</sup>

U.S. courts reason that users have presumptive knowledge of browsewrap agreements so long as they are placed prominently on the home page.<sup>608</sup> The major paradigmatic difference between the United States and the Eurozone is that European consumers are protected by paternalistic legislation governing TOUs, whereas the United States adopts a free market approach.<sup>609</sup>

The differences between the EU and the U.S. approaches to TOUs reflect different assumptions about the role of government in regulating markets.<sup>610</sup> In the United States, the skepticism regarding the efficacy of government regulation has been growing at the same time that enthusiasm for market-driven institutional arrangements has increased.<sup>611</sup> Consumers throughout the EU have mandatory rights and remedies that are non-waivable, regardless of whether or not the consumer reads these terms.

#### *I. Ninth Point: Inadequate Pre-contractual Disclosures in TOUs*

Europe's Unfair Contract Terms Directive mandates pre-contractual disclosures not found in U.S.-style TOUs. European consumers need to be able to access the terms of a TOU in any online contract classifiable as a distance contract. The software vendor or content provider must minimally make terms available in a manner that calls it to the attention of a reasonable person.<sup>612</sup> Neither shrinkwrap agreements nor box-top licenses meet this requirement because they are in effect "pay now and terms later." Shrinkwrap or box-top licenses have been of less significance in recent years as software vendors reduce margins by converting to online installwraps. Nevertheless, consumers continue to purchase boxed software at large retailers such as CompUSA, Office Depot, and Best Buy. For instance, Amazon.com sells business and office software, children's software, Web development tools, tax preparation software, and language and travel software. Consumers can buy boxed software for programs such as Adobe Acrobat Professional 9, TurboTax Deluxe, and Quicken on websites or in retail stores. Simply put, shrinkwraps where the consumer cannot view the terms prior to payment are invalid in all twenty-seven

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607. *Id.* at 1067.

608. *Motise v. AOL, Inc.*, 346 F. Supp. 2d 563, 565 (S.D.N.Y. 2004).

609. *See generally* Rustad, *supra* note 217, at 577.

610. Winn & Bix, *supra* note 213, at 183 (2006).

611. Winn & Webber, *supra* note 350, at 209.

612. UCITA § 113 cmt. 2(a).

Member States of the EU under the Unfair Contract Terms Directive.<sup>613</sup>

*J. Tenth Point: No Guarantee of a Minimum Adequate Remedy*

The concept of a minimum adequate remedy ensures that licensees or users of content have remedies for bad software or content that is the proximate cause of economic losses. The emergent norm is to validate TOUs that do not give the user a remedy other than to stop using software, content, or a social networking platform.<sup>614</sup> UCITA refuses to accept the doctrine of the “minimum adequate remedy” and does not provide consumers with special protections.<sup>615</sup> For example, UCITA reasons that an agreed limited remedy provision is enforceable even if it does not afford a consumer (or other licensee) a “minimum adequate remedy.”<sup>616</sup> The consumer’s only tools for challenging TOUs will be on the narrow grounds of unconscionability, fundamental public policy, and the issue of mutuality of obligation.<sup>617</sup> None of these tools is promising in addressing problems such as one-sided choice of law and forum clauses.

Professor Marotta-Wurgler’s empirical study of TOUs found that most sellers restrict remedies and completely disclaim consequential damages.<sup>618</sup>

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Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

Council Directive on Unfair Terms in Consumer Contracts 93/13/EEC (Apr. 5, 1993), at art. 4(1).

614. See, e.g., *Terms of Service*, MUBI.COM, [http://mubi.com/terms\\_of\\_service](http://mubi.com/terms_of_service) (last visited June 10, 2012) (“Therefore, you should review these Terms of Service prior to each purchase so you will understand the terms applicable to such transaction. If you do not agree to these Terms of Service, do not make any purchases on the Site or the Social Network”). Additionally, the terms of service for Stickam.com include the following language:

By actually using the Services. In this case, you understand and agree that Stickam will treat your use of the Services as acceptance of the Terms of Service from that point onwards. In the event that you do not agree to the Terms of Service, or any changes or modifications thereto, you should not continue to access or use the Services provided by Stickam. In the event that you do not agree to the Terms of Service, or any changes or modifications thereto, you should not continue to access or use the Services provided by Stickam.

*Terms of Service*, STICKAM.COM, [http://www.stickam.com/viewUniversal\\_Terms.do](http://www.stickam.com/viewUniversal_Terms.do) (last visited June 10, 2012).

615. UCITA § 803 cmt. 6.

616. *Id.*

617. *Id.*

618. Marotta-Wurgler, *supra* note 52, at 700 (concluding that in the sample of 647

U.S. software companies have no statutory obligation to give consumers a minimum adequate remedy, guaranteed under European Law by the Unfair Contract Terms Directive. UCITA rejects the doctrine of the minimum adequate remedy; it states that “[a]n agreed remedy provision does not fail because the court believes that the remedy does not afford a ‘minimum adequate remedy.’”<sup>619</sup> If a licensee can prove that “performance of an exclusive or limited remedy causes the remedy to fail of its essential purpose,” he may pursue any other UCITA remedy.<sup>620</sup> UCITA’s doctrine of the failure of essential purpose is the functional equivalent of Article 2’s provision in UCC § 2-719(2).<sup>621</sup> Software makers’ limited remedies may fail due to their essential purpose. Similarly, if an exclusive remedy is stricken as unconscionable, the aggrieved party may seek any of the statutory remedies of UCITA.<sup>622</sup> The Reporter’s notes explain that a licensee may challenge remedies on grounds of unconscionability, fundamental public policy, and for determining whether mutuality of obligation exists for a binding contract.<sup>623</sup> In the Reporter’s view, this is the “floor on what agreed terms are binding with respect to remedies.”<sup>624</sup>

Social networking sites use a contracting form that essentially deprives consumers of any meaningful remedy. Facebook, the largest social media site, disclaims all responsibility and requires users to assume the risk of using their website and its services:

WE TRY TO KEEP FACEBOOK UP, BUG-FREE, AND SAFE, BUT YOU USE IT AT YOUR OWN RISK. WE ARE PROVIDING FACEBOOK AS IS WITHOUT ANY EXPRESS OR IMPLIED WARRANTIES INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. WE DO NOT GUARANTEE THAT FACEBOOK WILL BE SAFE OR SECURE. FACEBOOK IS NOT RESPONSIBLE FOR THE ACTIONS, CONTENT, INFORMATION, OR DATA OF THIRD PARTIES, AND YOU RELEASE US, OUR DIRECTORS, OFFICERS, EMPLOYEES, AND AGENTS FROM ANY CLAIMS AND DAMAGES, KNOWN AND

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standard form TOUs that sellers “limit damages by disclaiming consequential, special, and incidental damages, or by disclaiming damages for foreseeable loss” and on occasion go so far as to “restrict the theories of liability on which buyers can base causes of action against them”).

619. UCITA § 803 cmt. 6.

620. *Id.* § 803(b).

621. U.C.C. § 2-719(2) (1996) (“Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.”).

622. UCITA § 803(c).

623. *Id.*

624. *Id.* § 803 cmt. 6.

UNKNOWN, ARISING OUT OF OR IN ANY WAY CONNECTED WITH ANY CLAIM YOU HAVE AGAINST ANY SUCH THIRD PARTIES. IF YOU ARE A CALIFORNIA RESIDENT, YOU WAIVE CALIFORNIA CIVIL CODE § 1542, WHICH SAYS: A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.<sup>625</sup>

U.S.-style TOUs, such as Facebook's Terms of Use, do not comply with the Unfair Contracts Term Directive because of their total disavowal of responsibility and failure to provide a meaningful guaranteed remedy.

European courts take the position that even if a consumer assents to an abusive term, it is unenforceable as a matter of law and European consumers, unlike their American counterparts, cannot be hauled into distant forums and be divested of mandatory consumer protection. The illustrative cases from Europe highlight diametrically opposed mass-market licensing paradigms. The U.S. market-based approach is antithetical to the European paternalistic approach to consumer contracts. By contrast, in the Eurozone, there is a growing acceptance of mandatory consumer rules.<sup>626</sup> The purpose of the EU was to create a seamless body of consumer protection, providing certainty for consumers and predictability for the business community. Winn and Weber note how the European Commission noted that "[c]onsumer confidence needs to be enhanced if e-commerce is to achieve its full potential."<sup>627</sup> The European Commission contends that e-commerce will increase only if consumers are convinced they have a minimal adequate remedy when entering into cross-border sales and services.<sup>628</sup>

The EU's harmonized rules for consumer protection enable cross-border sales. In addition, the seamless consumer rules enable EU consumers to purchase goods and services in the other Member States with confidence. A high level of consumer protection necessitates higher costs because merchants, to avoid the liability imposed by the law, must offer products more responsive to consumer expectations. However, the

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625. *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/terms.php?ref=pf> (last updated Apr. 26, 2011).

626. See Rustad, *supra* note 218, at 577.

627. Winn & Webber, *supra* note 350, at 211.

628. "The [Directive on Consumer Rights] Proposal ensures a high level of consumer protection and aims at establishing the real retail internal market, making it easier and less costly for traders to sell cross border and providing consumers with a larger choice and competitive price." *Europam Proposal for a Directive on Consumer Rights*, [http://ec.europa.eu/consumers/rights/cons\\_acquis\\_en.htm](http://ec.europa.eu/consumers/rights/cons_acquis_en.htm) (last visited June 10, 2012).



merchants are secure about recovering these costs because a high level of consumer protection encourages consumers to buy more new products, while by contrast, a low level of consumer protection could decrease the number of transactions. The wedge between European and American consumer protection will result in further disputes between U.S. software companies and European consumer authorities.<sup>629</sup>

### CONCLUSION

Robert Kagan's article in *The Economist* entitled "Old America v. New Europe," explodes the naive assumption that Europe is a an old continent while America is a mere teenager.<sup>630</sup> America's political system is a senior citizen compared to the upstart European Union. The golden age of U.S.-style TOUs may be coming to an end because of the increasingly flattened world in which U.S. companies license content to European consumers. The United States is like Mars and Europe like Venus when it comes to consumer rights for TOUs. When it comes to the reform of unjust rules such as those enforced in the United States, it will not do to simply "let the market solve the problem." Europeans recognize that there is no freedom of contract when it comes to standard-form consumer contracts. Europe has breached the citadel of regressive software licensing practices in enacting community-wide directives and regulations to protect consumers against abuses by dominant software companies.

America is falling behind the European Union in protecting consumer's rights in online transactions. If the United States wants to continue to be competitive in the international arena and continue to sell software programs in Europe, it should adopt a more consumer-friendly approach. As a result, the United States should reform the law governing software transactions imposing some limits on the terms of shrinkwrap and clickwrap licenses. This Article proposes ten reasons why TOUs must change in order to be broadly enforceable in the Eurozone. The U.S.-style TOU is unenforceable in other areas of the world as well. Japanese contract law likely does not recognize the enforceability of shrinkwrap agreements, absent proof that the consumer is aware of the license terms before purchasing the software.<sup>631</sup> Many software publishers print the

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629. See generally Winn & Bix, *supra* note 213.

630. Kagan notes how America's political system is old as compared to the upstart European Union. The U.S. free market approach to consumer e-commerce relies upon private ordering generally taking the form of one-sided clickwrap license agreements that disclaim all warranties, meaningful remedies, and require them to litigate in the functional equivalent of Siberia. It may come as a surprise to some e-businesses that European courts are not as eager to enforce one-sided choice of law or forum clauses in consumer transactions. Rustad, *supra* note 218, at 577.

631. Tsuneo Matsumoto, *Article 2B and Mass Market License Contracts: A Japanese*

software license on the box, giving consumers the opportunity to read the license terms. Laws have been proposed in Japan that suggest a refusal to enforce box-top licenses if the terms are one-sided and unfavorable to the consumer.<sup>632</sup>

This means that unfair terms cannot be enforceable against the consumer even if the opportunity to review the terms and assent is present. In a globalized networked economy, U.S. companies must localize their TOUs to conform to mandatory consumer rules around the world. The U.S. approach enforces one-sided license agreements deferring to the free market. There are many cases in the United States that illustrate a tendency by courts to defer to market-based license agreements that favor the dominant party, so long as the consumer has the opportunity to read or review the contractual clauses.<sup>633</sup> However, the general lesson drawn from Europe is that the mere opportunity to review oppressive terms is not enough to preordain enforcement. Software publishers are licensing their products in a flattened world. The stabilization of society through contract law requires the adjustment of competing interests. Since the birth of the industry, the law of contracts has been lagging behind the rapidly evolving technology. The law of terms of service is not settled until it is settled in a way that is fair to consumers throughout the world. Greater consumer rights in social networking sites is based on reason and tested by the European experience.

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*Perspective*, 13 BERKELEY TECH. L.J. 1283, 1284 (1998).

632. *Id.* at 1285.

633. *See Winn, supra* note 213, at 1361 (“[C]ourts reviewing the contracting interfaces used by adware distributors in light of current law are unlikely to demand that they make clear and explicit disclosures before claiming that consumers have consented to running their software.”).